DOCKET

No. 08-1569

Title: United States, Petitioner

v.

Martin O'Brien and Arthur Burgess

Docketed: June 23, 2009

Lower Ct: United States Court of Appeals for the First Circuit

Case Nos.: (07-2312)

Decision Date: September 23, 2008

Rehearing Denied: January 26, 2009

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 15 2009	Application (08A898) to extend the time to file a petition for a writ of certiorari from April 26, 2009 to May 26, 2009, submitted to Justice Souter.
Apr 15 2009	Application (08A898) granted by Justice Souter extending the time to file until May 26, 2009.
May 12 2009	Application (08A898) to extend further the time to file a petition for a writ of certiorari from May 26, 2009 to June 25, 2009, submitted to Justice Souter.
May 13 2009	Application (08A898) granted by Justice Souter extending the time to file until June 25, 2009.
Jun 23 2009	Petition for a writ of certiorari filed. (Response due July 23, 2009)
Jul 16 2009	Order extending time to file response to petition to and including August 24, 2009, for all respondents.
Aug 21 2009	Brief of respondent Arthur Burgess in opposition filed.
Aug 21 2009	Motion for leave to proceed in forma pauperis filed by respondent Arthur Burgess.
Aug 24 2009	Brief of respondent Martin O'Brien in opposition filed.
Aug 24 2009	Motion for leave to proceed in forma pauperis filed by respondent Martin O'Brien.
Sep 9 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 17 2009	Reply of petitioner United States filed. (Distributed)
Sep 30 2009	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Sep 30 2009	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Sep 30 2009	Petition GRANTED.
Oct 5 2009	Motion to appoint counsel filed by respondent Arthur Burgess.
Oct 7 2009	Motion to appoint counsel filed by respondent Martin O'Brien.
Oct 20 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including November 25, 2009.
Oct 20 2009	The time within which to file respondents' briefs on the merits is extended to and including January 14, 2010.
Oct 28 2009	Motion DISTRIBUTED for Conference of November 13, 2009.
Nov 16 2009	Motion to appoint counsel filed by respondent GRANTED. Leslie Feldman-Rumpler, Esq., of Boston, Massachusetts, is appointed to serve as counsel for respondent Arthur Burgess in this case.
Nov 16 2009	Motion to appoint counsel filed by respondent GRANTED. Timothy P. O'Connell, Esquire, of Charlestown, Massachusetts, is appointed to serve as counsel for respondent Martin O'Brien in this case.

Nov 25 2009	Joint appendix filed.
Nov 25 2009	Brief of petitioner United States filed.
Nov 30 2009	SET FOR ARGUMENT ON Tuesday, February 23, 2010.
Dec 7 2009	CIRCULATED.
Dec 30 2009	Record from U.S.C.A. for the First Circuit. (1 box)
Jan 8 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for respondent Arthur Burgess.
Jan 14 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for respondent Martin O'Brien.
Jan 14 2010	Brief of respondent Martin O'Brien filed. (Distributed)
Jan 14 2010	Brief of respondent Arthur Burgess filed. (Distributed)
Jan 19 2010	Motion for divided argument filed by respondents.
Jan 21 2010	Brief amicus curiae of Center on the Administration of Criminal Law filed. (Distributed)
Jan 21 2010	Brief amicus curiae of National Association of Federal Defenders filed. (Distributed)
Jan 21 2010	Brief amici curiae of Families Against Mandatory Minimums, et al. filed. (Distributed)
Jan 25 2010	Motion for divided argument filed by respondents DENIED.
Feb 16 2010	Reply of petitioner United States filed. (Distributed)
Feb 23 2010	Argued. For petitioner: Benjamin Horwich, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Jeffrey L. Fisher, Stanford, Cal.

PETITION FOR WRIT OF CERTIORARI

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELENA KAGAN
Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

BENJAMIN J. HORWICH
Assistant to the Solicitor General

SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 924(c)(1) of Title 18 of the United States Code provides for a series of escalating mandatory minimum sentences depending on the manner in which the basic crime (*viz.*, using or carrying a firearm during and in relation to an underlying offense, or possessing the firearm in furtherance of that offense) is carried out. The question presented is whether the sentence enhancement to a 30-year minimum when the firearm is a machinegun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by the preponderance of the evidence.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory provision involved 2
Statement 3
Reasons for granting the petition 10
A. The court of appeals' decision widens and entrenches an existing conflict among the circuits 11
B. The court of appeals' ruling is incorrect 13
C. The question presented is of substantial importance, and this case is a good vehicle for its resolution 18
Conclusion 20
Appendix A – Appeal from the United States District Court for the District of Massachusetts (Sept. 23, 2008) 1a
Appendix B – Judgment (Sept. 23, 2008) 14a
Appendix C – Plea hearing (Apr. 2, 2007) 15a
Appendix D – Order of court (Jan. 26, 2009) 19a

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 17
Castillo v. *United States*, 530 U.S. 120 (2000) ..... *passim*
Deal v. *United States*, 508 U.S. 129 (1993) 14, 15, 16
Dean v. *United States*, 129 S. Ct. 1849 (2009) 5, 15, 16
Harris v. *United States*, 536 U.S. 545 (2002) ..... *passim*
Jones v. *United States*, 526 U.S. 227 (1999) 17
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 17
United States v. *Avery*, 295 F.3d 1158 (10th Cir.), cert. denied, 537 U.S. 1024 (2002) 11

Cases—Continued: Page

United States v. *Booker*, 543 U.S. 220 (2004) 12
United States v. *Cassell*, 530 F.3d 1009 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1038 (2009) 11, 12, 20
United States v. *Ciszkowski*, 492 F.3d 1264 (11th Cir. 2007) 11, 12, 19
United States v. *Cristobal*, 293 F.3d 134 (4th Cir.), cert. denied, 537 U.S. 963 (2002) 16
United States v. *Davis*, 306 F.3d 398 (6th Cir. 2002), cert. denied 537 U.S. 1208 (2003) 16
United States v. *Dixon*, 273 F.3d 636 (5th Cir. 2001), cert. denied, 537 U.S. 829 (2002) 11
United States v. *Freed*, 401 U.S. 601 (1971) 18
United States v. *Gamboa*, 439 F.3d 796 (8th Cir.), cert. denied, 549 U.S. 1042 (2006) 11, 12, 19
United States v. *Harris*:
No. 03-6207 (6th Cir. June 8, 2005) 13
397 F.3d 404 (6th Cir. 2005) 12
United States v. *Harrison*, 272 F.3d 220 (4th Cir. 2001), cert. denied, 537 U.S. 839 (2002) 11, 20
United States v. *Hatcher*, 501 F.3d 931 (8th Cir. 2007), cert. denied, 128 S. Ct. 1133 (2008) 16
United States v. *Hoosier*, 442 F.3d 939 (6th Cir. 2006) ... 19
United States v. *Madrid*, 222 Fed. Appx. 721 (10th Cir. 2007) 16
United States v. *Mejia*, 545 F.3d 179 (2d Cir. 2008) 16
United States v. *Rivera-Rivera*, 555 F.3d 277 (1st Cir. 2009) 16
United States v. *Sandoval*, 241 F.3d 549 (7th Cir.), cert. denied, 534 U.S. 1057 (2001) 11

Cases—Continued: Page

United States v. *Smith*, 296 F.3d 344 (5th Cir.), cert. denied, 537 U.S. 1012 (2002), and 538 U.S. 935 (2003) 16

United States v. *Thompson*, 515 F.3d 556 (6th Cir. 2008) 12

United States v. *Williams*, 65 Fed. Appx. 819 (3d Cir.), cert. denied, 540 U.S. 932 (2003) 16

United States v. *Woodruff*, 296 F.3d 1041 (11th Cir. 2002), cert. denied, 537 U.S. 1114 (2003) 16

Statutes and sentencing guideline:

Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 5

Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(C)-(E), 100 Stat. 457 4

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 233 4

18 U.S.C. 2 7

18 U.S.C. 922(g) 4

18 U.S.C. 924(c) ..... *passim*

18 U.S.C. 924(c)(1) (Supp. V 1993) 4, 9, 14, 15, 17

18 U.S.C. 924(c)(1) ..... *passim*

18 U.S.C. 924(c)(1)(A) 7, 8, 11, 13, 14

18 U.S.C. 924(c)(1)(A)(i) 17

18 U.S.C. 924(c)(1)(A)(ii) 9, 11

18 U.S.C. 924(c)(1)(A)(ii)-(iii) 5, 16

18 U.S.C. 924(c)(1)(B) ..... *passim*

18 U.S.C. 924(c)(1)(B)(i) 12, 16, 17, 18

18 U.S.C. 924(c)(1)(B)(i)-(ii) 5

Statutes and sentencing guideline—Continued: Page

18 U.S.C. 924(c)(1)(B)(ii) ..... *passim*
18 U.S.C. 924(c)(1)(C) 5
18 U.S.C. 924(c)(1)(C)(i) 16
18 U.S.C. 924(c)(1)(C)(i)-(ii) 5
18 U.S.C. 924(c)(1)(C)(ii) 16
18 U.S.C. 924(c)(1)(D)(i) 16
18 U.S.C. 924(c)(1)(D)(ii) 16
18 U.S.C. 924(e) 4, 19
18 U.S.C. 1951 3
United States Sentencing Guidelines § 2K2.4(b) 12

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 542 F.3d 921.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2008. A petition for rehearing was denied on January 26, 2009 (App., *infra*, 19a-20a). On April 15, 2009, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including May 26, 2009. On May 13, 2009, Justice Souter further

extended the time to June 25, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Title 18 of the United States Code, Section 924(c)(1), provides:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection—
>
> (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the

person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

STATEMENT

Following guilty pleas in the United States District Court for the District of Massachusetts, respondents were convicted of conspiring to affect commerce by robbery, in violation of 18 U.S.C. 1951; attempting to affect commerce by robbery, in violation of 18 U.S.C. 1951; and

using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c)(1). Respondent Burgess additionally was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). O'Brien Judgment 1; Burgess Judgment 1. Respondent O'Brien was sentenced to 180 months of imprisonment, including a 102-month consecutive term on the Section 924(c)(1) conviction, to be followed by three years of supervised release. Gov't C.A. App. 238. Burgess was sentenced as an armed career criminal (see 18 U.S.C. 924(e)) to 264 months of imprisonment, including an 84-month consecutive term on the Section 924(c)(1) conviction, to be followed by three years of supervised release. Gov't C.A. App. 237, 240. The district court declined to increase the sentences under Section 924(c)(1)(B)(ii) because the firearm used, carried, and possessed was a machinegun. The government appealed the district court's refusal to impose the higher mandatory minimum term of imprisonment. The court of appeals affirmed. App., *infra*, 1a-13a.

1. Since its enactment in 1968, 18 U.S.C. 924(c) has made it a criminal offense for an individual to use or carry a firearm during the commission of certain federal crimes. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 233. In 1986, Congress provided for higher fixed mandatory sentences when the firearm has certain characteristics (*e.g.*, is a machinegun or has a silencer). See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(C)-(E), 100 Stat. 457. In *Castillo* v. *United States*, 530 U.S. 120, 123-131 (2000), this Court interpreted that version of Section 924(c)(1), stating that the type of firearm was not a sentencing factor for the

judge, but rather an element of a "separate crime." The Court therefore held that "the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt." *Id.* at 123.

In 1998, Congress entirely replaced Section 924(c)(1).[1] Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469. The new provision describes the offense in Subparagraph (A): using or carrying a firearm during and in relation to certain crimes, or possessing a firearm in furtherance of such crimes. The provision then separately lists in Clauses (A)(ii)-(iii), (B)(i)-(ii) and (C)(i)-(ii) circumstances affecting the sentence. Under the current version of the statute, Congress did not limit the sentencing judge to a defined maximum (as the pre-1998 statute did in prescribing determinate sentences). The new statute instead provides an escalating series of mandatory *minimum* sentences. Under the terms of the new statute, enhanced penalties apply when the firearm is "brandished" or "discharged" (18 U.S.C. 924(c)(1)(A)(ii)-(iii)), which this Court has since recognized to be sentencing factors. See *Harris* v. *United States*, 536 U.S. 545, 552-556 (2002) (brandishing); *Dean* v. *United States*, 129 S. Ct. 1849, 1854 (2009) (discharge). Enhanced penalties also apply when the firearm has particularly dangerous characteristics, 18 U.S.C. 924(c)(1)(B), and when the defendant has previously been convicted under Section 924(c), 18 U.S.C. 924(c)(1)(C). For example, as relevant here, 18 U.S.C. 924(c)(1)(B)(ii) specifies a 30-year minimum term of imprisonment "[i]f the firearm possessed by a

---

[1] Although decided after enactment of the current version of Section 924(c)(1), *Castillo* interpreted the pre-1998 version. See *Castillo*, 530 U.S. at 121, 125.

person convicted of a violation of [Section 924(c)] * * * is a machinegun."

2. a. Respondents, along with co-defendants Dennis Quirk, Jason Owens, and Patrick Lacey, conspired and attempted to rob a Loomis-Fargo armored car as it made a scheduled delivery of cash to a bank located on a busy street in the North End of Boston, Massachusetts. Respondents and Quirk hid inside a minivan—O'Brien armed with a semi-automatic Sig-Sauer pistol, Burgess with a semi-automatic AK-47 assault rifle, and Quirk with a fully automatic Cobray machine pistol. The targeted armored car carried almost $2 million in cash, and contrary to usual practice, it had two guards instead of one. As one guard unloaded boxes of coins from the opened rear door of the armored car, the other guard stood near a bag containing about $275,000 in cash that was placed on the pavement. When one of the robbers exited the minivan with a weapon pointed at the closest guard, that guard dropped to the pavement as ordered, but the second guard used the truck as cover to run down the sidewalk to a nearby restaurant. The robbers' failure to control the second guard caused them to abort the robbery and flee the scene without taking any money. Co-defendant Lacey helped respondents and Quirk get away, and co-defendant Owens provided his apartment as a rendezvous for the robbers. Gov't C.A. App. 176-179, 236; Gov't Supp. C.A. App. 6-9, 49-53.

Authorities quickly located the robbers based on tips and other information. The evening of the attempted robbery, officers executed a search warrant at Owens's residence and in his room found the three firearms, each loaded: the semi-automatic Sig-Sauer with eight rounds of ammunition, the semi-automatic AK-47 with two banana clips holding 50 rounds, and the fully automatic

Cobray with a loaded magazine and a spare holding 48 rounds (some of them hollow point bullets, designed to spread out upon impact to maximize injury). Each gun had a round of ammunition in the chamber. Law enforcement officers also recovered bulletproof vests from the room. Gov't C.A. App. 179-180; Gov't Supp. C.A. App. 9, 52-53.

b. On July 20, 2005, a grand jury sitting in the District of Massachusetts returned an indictment charging respondents, along with some of the co-defendants, with various robbery and gun charges. Indictment 1-8. As relevant here, Count 3 charged respondents with using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c) and 18 U.S.C. 2. Count 3 listed the three firearms—the Cobray, the AK-47, and the Sig-Sauer—but did not identify the Cobray, which functioned in fully automatic mode, as a machinegun. Indictment 5; Gov't Supp. C.A. App. 9, 53. On February 21, 2007, a grand jury returned a second superseding indictment adding a Count 4, which charged respondents, based on the presence of the Cobray pistol, with using and carrying a machinegun during and in relation to, and possessing a machinegun in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and (B)(ii) and 18 U.S.C. 2. Second Superseding Indictment 6. The Cobray pistol remained charged in Count 3 without an assertion that it was a machinegun. *Id.* at 5.

Respondents moved to strike the reference to the Cobray pistol from Count 3 on the theory that the type of weapon used is an element of a Section 924(c)(1) offense and therefore properly charged only in a separate count, as it was in Count 4. Doc. 189. The government

responded that Section 924(c)(1)(B)'s firearm-type provisions are sentencing factors for the court to determine under a preponderance standard in the event of a conviction on the offense described in Section 924(c)(1)(A), which was charged in Count 3; the government therefore argued that Count 4 was not required by Section 924(c)(1) and should be disimssed. Doc. 204, at 2-3. At the same time, the government conceded that if the type of firearm is an offense element, the government could not prove this element beyond a reasonable doubt and the court should dismiss Count 4 on this basis. In particular, the government said it could not prove, as it assumed would be necessary, that respondents knew of the Cobray pistol's fully automatic action. *Id.* at 3-4.[2]

The district court held that the government was required to charge and prove to the jury that the Cobray pistol was a machinegun to trigger the mandatory minimum sentence under Section 924(c)(1)(B)(ii). App., *infra*, 15a-18a. Accordingly, the government asked the district court to dismiss Count 4, consistent with its prior concession. *Id.* at 4a, 18a; Gov't C.A. App. 142. Upon the dismissal of that count, respondents pleaded guilty to the remaining charges against them, including Count 3. Each respondent acknowledged that he was liable for the three firearms listed in Count 3, including the Cobray pistol. *Id.* at 142-143, 172-173.

---

[2] The correctness of the government's legal concession that if firearm characteristics are an element of the offense, the government would have to prove respondents' knowledge of the characteristics, is not a question presented here. No count before this Court charges the machinegun as an element, and the availability of the increased minimum sentence therefore rises or falls on whether the machinegun determination is a sentencing factor for the judge.

At sentencing, the district court found, without opposition, that respondents had brandished a firearm while violating Section 924(c), calling for a mandatory minimum sentence of seven years to be served consecutively to the sentences imposed on the other counts, pursuant to Section 924(c)(1)(A)(ii). Gov't C.A. App. 188-189, 209-211, 236-238. The court again rejected the government's argument that respondents were instead subject to a 30-year mandatory minimum consecutive sentence under Section 924(c)(1)(B)(ii) based on their possession of a machinegun. *Id.* at 192. The district court sentenced O'Brien to 180 months of imprisonment, including a consecutive 102-month term on the Section 924(c) charge. *Id.* at 238. As an armed career criminal, Burgess was sentenced to an aggregate 264 months of imprisonment, including a consecutive 84-month term on the Section 924(c) charge. *Id.* at 237.

c. The government appealed. A panel of the First Circuit held, "albeit with some misgivings," that Section 924(c)(1) requires the characteristics of the firearm to be found "by the jury as an element of the crime." App., *infra*, 1a-2a. The court observed that "[r]ead in a vacuum, the language of section 924(c) indicates that the 'offense' (carrying a five year minimum sentence) is the carriage, use or possession of a firearm during a drug or violent felony—all elements for the jury," whereas the "type of firearm—which merely raised the mandatory minimum —pose[s] [a] sentencing issue[] to be resolved by the judge." *Id.* at 5a. The panel further observed that such a reading "would comport with the statute's structure as well." *Ibid.* (citing *Harris*, 536 U.S. at 552-553). Nevertheless, the panel concluded that the Court's decision in *Castillo*—which interpreted the earlier and different version of Section 924(c)(1)—was "close to

binding" in the absence of "a clearer or more dramatic change in language or legislative history." *Id.* at 10a. The panel thus held that firearm characteristics are offense elements that must be decided by the jury, although it "concede[d] that, if we were writing on a clean slate, the statute's language would be a powerful argument" for the contrary conclusion. *Ibid.*

The court of appeals recognized its decision deepened an existing split among the circuits, but believed that only this Court had the prerogative to "reconsider[] or narrowly distinguish[]" *Castillo* in light of the new version of Section 924(c)(1). App., *infra*, 10a; see *id.* at 4a-5a & n.2. The court of appeals denied the government's petition for rehearing en banc. *Id.* at 19a-20a.

REASONS FOR GRANTING THE PETITION

The court of appeals has interpreted the firearm characteristics listed in 18 U.S.C. 924(c)(1)(B) as offense elements that must be charged in the indictment and proved to the jury, rather than as sentencing factors for the district court to determine. That ruling is contrary to the statute's text and structure and conflicts with this Court's reasoning in *Castillo* v. *United States*, 530 U.S. 120, 124-131 (2000), and *Harris* v. *United States*, 536 U.S. 545, 552-556 (2002). The ruling also widens and entrenches an existing circuit split. While the court of appeals' ruling accords with a ruling from one other circuit, six courts of appeals have held that the firearm characteristics in 18 U.S.C. 924(c)(1)(B) are sentencing factors. Because the question presented is an important and recurring one in federal prosecutions and is outcome-determinative in this case, the Court's review is warranted.

A. The Court Of Appeals' Decision Widens And Entrenches An Existing Conflict Among The Circuits

As the court of appeals acknowledged (App., *infra*, 4a-5a & n.2), the question presented here is the subject of a significant circuit conflict.

Six courts of appeals have held that Section 924(c)(1)(B), referring to various types of particularly dangerous weapons, sets forth sentencing factors that increase the minimum sentence for the crime defined in Section 924(c)(1)(A), rather than setting forth the elements of a distinct criminal offense. Accordingly, these circuits have held that the firearm's characteristics need not be charged in the indictment or found by a jury beyond a reasonable doubt. See *United States* v. *Cassell*, 530 F.3d 1009, 1017 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1038 (2009); *United States* v. *Harrison*, 272 F.3d 220, 225-226 (4th Cir. 2001), cert. denied, 537 U.S. 839 (2002); *United States* v. *Sandoval*, 241 F.3d 549, 550-552 (7th Cir.), cert. denied, 534 U.S. 1057 (2001); *United States* v. *Gamboa*, 439 F.3d 796, 810-812 (8th Cir.), cert. denied, 549 U.S. 1042 (2006); *United States* v. *Avery*, 295 F.3d 1158, 1171-1172 (10th Cir.), cert. denied, 537 U.S. 1024 (2002); *United States* v. *Ciszkowski*, 492 F.3d 1264, 1268-1269 (11th Cir. 2007); see also *United States* v. *Dixon*, 273 F.3d 636, 640 n.2 (5th Cir. 2001) (dicta), cert. denied, 537 U.S. 829 (2002).

These courts have generally applied the analysis in this Court's opinion in *Harris*, which interpreted the new version of Section 924(c) to provide that whether the firearm is "brandished," 18 U.S.C. 924(c)(1)(A)(ii), is a sentencing factor, not an offense element. 536 U.S. at 552-556. The courts of appeals have reasoned that this Court's analysis in *Harris* of the structural and textual aspects of Section 924(c)(1)(A) "applies with equal force

to the factors listed in [Section] 924(c)(1)(B)." *Gamboa*, 439 F.3d at 811.

Two circuits, in contrast, have held that the firearm characteristics in 18 U.S.C. 924(c)(1)(B) are elements of aggravated offenses, and so must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt. See App., *infra*, 1a-13a; *United States* v. *Harris*, 397 F.3d 404, 412, 414 (6th Cir. 2005). In its opinion in *Harris*, the Sixth Circuit acknowledged that the structure of the statute indicates that the firearm characteristics are sentencing factors. The court held, however, that the length of the prescribed minimum sentences and a (perceived) tradition of treating firearm characteristics as offense elements provided "compelling evidence to the contrary." *Id.* at 413 (citation omitted).[3]

More importantly, the split is now entrenched. Before the decision below, a prospect existed that the Sixth Circuit would correct its jurisprudence and join the otherwise unanimous view that Section 924(c)(1)(B) states sentencing factors. But now, the First Circuit has

---

[3] In addition, the Sixth Circuit relied on Sentencing Guidelines § 2K2.4(b), which sets the advisory Guidelines sentence for Section 924(c) offenses as equal to the Section 924(c) mandatory minimum sentence (absent an upward departure). Based on this equivalence, the Sixth Circuit held that interpreting the firearm characteristics as sentencing factors "would [present] a serious constitutional problem because of its potential conflict with *Booker*'s Sixth Amendment holding." *Harris*, 397 F.3d at 413 (citing *United States* v. *Booker*, 543 U.S. 220, 226-229, 244 (2004)). Apart from the Sixth Circuit, no court of appeals has found *Booker* to justify reading Section 924(c)(1)(B)(i) and (ii) as offense elements. See, *e.g.*, *Cassell*, 530 F.3d at 1017; *Ciszkowski*, 492 F.3d at 1268; *Gamboa*, 439 F.3d at 811. Moreover, the Sixth Circuit has since held that *Booker* did not overrule this Court's decision in *Harris*. See *United States* v. *Thompson*, 515 F.3d 556, 564-565 (2008).

joined the Sixth Circuit, and both have rejected the government's petitions for rehearing. App., *infra*, 19a-20a; *United States* v. *Harris*, No. 03-6207 (6th Cir. June 8, 2005). Accordingly, this Court's intervention is necessary to resolve the conflict.

B. The Court Of Appeals' Ruling Is Incorrect

Contrary to the decision below, the firearm characteristics in Section 924(c)(1)(B) are not offense elements, but sentencing factors. The court of appeals' reliance on this Court's decision in *Castillo* for a contrary interpretation is misplaced. In *Castillo*, this Court construed a prior version of Section 924(c)(1), holding that firearm characteristics were elements of a "separate crime" and therefore "the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt." 530 U.S. at 123-131. But the version of Section 924(c)(1) under which respondents were convicted differs fundamentally from the older version that *Castillo* construed, and under *Castillo*'s own logic the statute now states sentencing factors. Indeed, this Court in *Harris* has already read a parallel provision of the current version of Section 924(c)(1) to state sentencing factors, rather than offense elements. On a similar analysis, the text, structure, and effect of the current statute reveal Congress's intent to establish sentencing factors in Section 924(c)(1)(B) that, when proved to the court by a preponderance of the evidence, trigger the specified mandatory minimum sentence for the "single offense" defined in Section 924(c)(1)(A). *Harris*, 536 U.S. at 556.

1. The statute's text compels the conclusion that the firearm characteristics are sentencing factors. The opening phrase of Section 924(c)(1)(B) makes clear that

the enhancements for certain firearm characteristics apply to "a person *convicted of a violation* of this subsection." 18 U.S.C. 924(c)(1)(B) (emphasis added). "Convicted of" refers to a finding of guilt, which necessarily precedes sentencing. Cf. *Deal* v. *United States*, 508 U.S. 129, 132 (1993) ("In the context of [Section] 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury."). Unlike the "neutral" and essentially indeterminate language of the prior version of Section 924(c), see *Castillo*, 530 U.S. at 124, the new language signifies Congress's intent that the mandatory minimum sentences specified in the clauses that follow apply only *after* the defendant has been convicted of the Section 924(c)(1)(A) offense.

2. The statute's structure reinforces this conclusion. The prior version of Section 924(c)(1) consisted of a single paragraph comprising a lengthy, unbroken sentence describing the offense, followed by separate sentences about recidivist sentencing, probation and consecutive sentencing, and parole.[4] This Court explained in *Cas-*

---

[4] The version of Section 924(c)(1) at issue in *Castillo* provided:

Whoever, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, shall * * * be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or a firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this sub-

tillo that Congress "placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence, not broken up by dashes or separated into subsections," which "strongly suggest[ed] that the basic job of the entire first sentence is the definition of crimes and the role of the remaining three [sentences] is the description of factors" relevant to sentencing. 530 U.S. at 124-125.

The current version of Section 924(c)(1) is arranged very differently: it contains an initial sentence defining the prohibited conduct and then contains a dash, followed by separate subsections that describe factors bearing on the length of the sentence. In *Harris*, the Court explained that the new structure pointed in the opposite direction from *Castillo*: "Federal laws usually list all offense elements 'in a single sentence' and separate the sentencing factors 'into subsections.'" *Harris*, 536 U.S. at 552 (quoting *Castillo*, 530 U.S. at 125). "When a statute has this sort of structure"—which, the Court noted, Section 924(c)(1) does—"we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors." *Id.* at 553. The Court echoed that observation in *Dean* v. *United States*, 129 S. Ct. 1849 (2009), stating that: "The principal paragraph [of Section 924(c)(1)] defines a complete offense and the subsections 'explain how defendants are

---

section run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

Castillo, 530 U.S. at 131-132 (Appendix to Opinion of the Court) (quoting 18 U.S.C. 924(c)(1) (Supp. V 1993) (footnote omitted)).

to "be sentenced."'" *Id.* at 1853 (quoting *Harris*, 536 U.S. at 552).

The same analysis applies here. Clauses (B)(i) and (ii), which identify firearm characteristics, are structurally indistinguishable from Clauses (A)(ii)-(iii), which identify ways in which the firearm was used (brandishing and discharge, respectively). This Court held in *Harris* and *Dean* that brandishing and discharge are sentencing factors. See *Harris*, 536 U.S. at 552-556; *Dean*, 129 S. Ct. at 1854. Similarly, and for the same reasons, the clauses under Subparagraph (B) set forth sentencing factors. Indeed, Subparagraph (B) is surrounded by sentencing provisions. The unanimous view of the courts of appeals to consider the question is that the recidivist sentencing rules in Clauses (C)(i) and (ii) are also sentencing factors.[5] And Clauses (D)(i) and (ii) obviously pertain to sentencing by prohibiting the imposition of probation and providing for a consecutive sentence. Within this context, Clauses (B)(i) and (ii) are most naturally read as sentencing factors.

3. The effect that Clauses (B)(i) and (ii) have on sentencing confirms the conclusion that they state sentencing factors. Unlike the firearm-type provisions in the

---

[5] See *United States* v. *Rivera-Rivera*, 555 F.3d 277, 290-292 (1st Cir. 2009); *United States* v. *Mejia*, 545 F.3d 179, 207-208 (2d Cir. 2008); *United States* v. *Williams*, 65 Fed. Appx. 819, 823 (3d Cir.), cert. denied, 540 U.S. 932 (2003); *United States* v. *Cristobal*, 293 F.3d 134, 147-148 (4th Cir.), cert. denied, 537 U.S. 963 (2002); *United States* v. *Smith*, 296 F.3d 344, 348-349 (5th Cir.), cert. denied, 537 U.S. 1012 (2002), and 538 U.S. 935 (2003); *United States* v. *Davis*, 306 F.3d 398, 411-412 (6th Cir. 2002), cert. denied, 537 U.S. 1208 (2003); *United States* v. *Hatcher*, 501 F.3d 931, 934-935 (8th Cir. 2007), cert. denied, 128 S. Ct. 1133 (2008); *United States* v. *Madrid*, 222 Fed. Appx. 721, 736 (10th Cir. 2007) (per curiam); *United States* v. *Woodruff*, 296 F.3d 1041, 1049-1050 (11th Cir. 2002), cert. denied, 537 U.S. 1114 (2003).

prior version of Section 924(c)(1) considered in *Castillo*, the current firearm-type provisions do not increase the statutory maximum sentence. For *any* violation of the current statute, the implied maximum term is life imprisonment. See, *e.g.*, 18 U.S.C. 924(c)(1)(A)(i) (requiring a sentence "of not less than 5 years" for a base offense); 924(c)(1)(B)(i) (requiring a sentence "of not less than 10 years" when the firearm possessed is a semiautomatic assault weapon); see also *Harris*, 536 U.S. at 574 (Thomas, J., dissenting) (referring to "the statutory maximum of life imprisonment for any violation of [Section] 924(c)(1)(A)"). The firearm-type provisions "alter only the minimum" sentence that may be imposed. *Id.* at 554. This Court's reasoning in *Harris* thus applies here as well: By "constrain[ing], rather than extend-[ing], the sentencing judge's discretion," the provisions "have an effect on the defendant's sentence that is more consistent with traditional understandings about how sentencing factors operate." *Ibid.*[6] In sum, the princi

---

[6] For similar reasons, reading the firearm characteristics as sentencing factors poses no constitutional concerns. The Constitution requires that any fact other than a prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). But a fact that increases a statutory minimum sentence within the range already authorized may be found by the sentencing judge by a preponderance of the evidence. *Harris*, 536 U.S. at 568. The firearm-type provisions at issue here, like the brandishing and discharge provisions at issue in *Harris*, do not "alter[] the maximum penalty for the crime committed" and instead "operate[] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 87-88 (1986). This fact, too, differentiates *Castillo*, in which the involvement of a machinegun increased the maximum sentence beyond that otherwise authorized. See *Castillo*, 530 U.S. at 124 ("[O]ur decision in *Jones* [v. *United States*, 526 U.S. 227 (1999)]

pal indicia of Congressional intent to which this Court looked in both *Castillo* and *Harris* point unequivocally toward treating the firearm characteristics in Section 924(c)(1)(B) as sentencing factors.

C. The Question Presented Is Of Substantial Importance, And This Case Is A Good Vehicle For Its Resolution

1. This case presents an issue of significant importance to the administration of federal criminal justice. The enhanced mandatory minimum sentences provided by Section 924(c)(1)(B)(i) and (ii) are important law-enforcement tools because they target particularly dangerous and threatening firearms—assault rifles, machineguns, sawed-off rifles and shotguns, bombs, grenades, missiles, mines, and the like. These weapons are of grave and particular concern because they can inflict enormous harm in a very short time, and many have no legitimate purpose outside the military and law enforcement. Cf. *United States* v. *Freed*, 401 U.S. 601, 609 (1971) ("[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons.") (footnote omitted). Section 924(c)(1) implements Congress's evident judgment that these firearms are so dangerous, so threatening, and so often illegitimate that when used to facilitate a drug trafficking crime or a crime of violence, an enhanced sentence is appropriate.

The First and Sixth Circuits' view undermines this statutory provision by increasing, beyond what Congress provided for or intended, the burden the govern-

---

concluded, in a similar situation [to the one addressed in *Castillo*], that treating facts that lead to an increase in the maximum sentence as a sentencing factor would give rise to significant constitutional questions.").

ment must carry to trigger the mandatory minimum sentences in Section 924(c)(1)(B). That increased burden would be particularly acute if the consequence of treating firearm characteristics as an offense element is to require the government to prove the defendant's knowledge of those characteristics, as some courts (and the government in this case) have assumed. Compare *Ciszkowski*, 492 F.3d at 1268 (firearm characteristics are sentencing factors, and the government need not prove a defendant's knowledge of those characteristics); *Gamboa*, 439 F.3d at 812 (same), with Gov't C.A. App. 142 (government's concession below that if firearm characteristics are offense elements, the government would need to prove respondents' knowledge of the characteristics); App., *infra*, 8a (decision below implying that it would require proof of defendant's knowledge); *United States* v. *Hoosier*, 442 F.3d 939, 944 (6th Cir. 2006) (describing indictment alleging "knowing possession of an SKS assault rifle"). As in this case, knowledge of firearm characteristics may be difficult to establish, leading to sentences below what Congress gave every sign of wanting for use of highly dangerous weapons.

Because the split in the circuits is over a mandatory minimum sentence, it frequently results in widely varying sentences. For example, respondent O'Brien was sentenced to a 15-year prison term, but in most other circuits, he would have faced at least a 30-year term for his crimes. Likewise, respondent Burgess (an armed career offender subject to 18 U.S.C. 924(e)) was sentenced to consecutive 15-year and 7-year statutory minimum prison terms, but in most other circuits he would have faced at least a 45-year total term. Such significant disparities should not occur simply because of the circuit in which a prosecution takes place.

2. This case is a good vehicle for resolving the question presented. The government preserved the issue for appeal at multiple points in the record. See Doc. 204; Gov't C.A. App. 142, 192. The case arises cleanly on direct review, not on review for plain error (as in *Harrison*, 272 F.3d at 224) or in the form of a claim of ineffective assistance of counsel (as in *Cassell*, 530 F.3d at 1011-1012). Moreover, this Court's decision would be outcome-determinative. Affirming the decision below would end the matter, because the government has conceded in this case that if the firearm characteristics are elements, it must—but cannot—prove to a jury that respondents knew the Cobray pistol had fully automatic action. Conversely, reversing the decision below would lead to resentencing, at which the government's laboratory testing showing the Cobray pistol's fully automatic action, see Gov't Supp. C.A. App. 9, 53, likely would be uncontroverted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BENJAMIN J. HORWICH
Assistant to the Solicitor General
SANGITA K. RAO
Attorney

JUNE 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2312

UNITED STATES OF AMERICA, APPELLANT

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,
DEFENDANTS-APPELLEES

Sept. 23, 2008

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Mark L. Wolf, *U.S. District Judge*]

Before BOUDIN and DYK,* Circuit Judges, and DOMÍNGUEZ,** District Judge.

BOUDIN, Circuit Judge.

The question posed by this appeal is whether, under a statute forbidding the carrying and use of guns in connection with a federal crime, the nature of the weapon is to be found by the judge as a sentencing matter or by the jury as an element of the crime. Most circuits have

---

* Of the Federal Circuit, sitting by designation.

** Of the District of Puerto Rico, sitting by designation.

said the former; believing ourselves largely constrained by a Supreme Court decision interpreting a prior version of the statute, we reach the opposite result, albeit with some misgivings.

The facts can be easily summarized. On the morning of June 16, 2005, defendants Martin O'Brien and Arthur Burgess, along with a third confederate Dennis Quirk, prepared to rob a Loomis-Fargo armored car. Between them, they carried three weapons: a Sig-Sauer pistol (O'Brien), a semi-automatic AK-47 assault rifle (Burgess), and a fully automatic Cobray pistol (Quirk). Part way into the robbery a guard escaped and the defendants fled but were later caught and indicted.

Counts one and two of the indictment alleged Hobbs Act violations for attempted robbery and conspiracy to affect interstate commerce, 18 U.S.C. § 1951 (2000); count three charged the defendants with using or carrying a firearm in furtherance of a crime of violence, *id.* § 924(c); count four charged defendants with using a machine-gun in furtherance of a crime of violence, *id.* § 924(c); and counts five and six charged some defendants as felons in possession of firearms, *id.* § 922(g). The Cobray pistol, which had been modified to operate as a fully automatic weapon, was listed both in count three as one of three firearms and in count four as the machine-gun.[1]

---

[1] Although the definitional section governing section 924(c) does not separately define machine-gun, the term has been widely taken to mean a fully automatic weapon that fires continuously with a single pull on the trigger. *See, e.g.*, 26 U.S.C. § 5845 (2000). A semi-automatic, by contrast, chambers a new round automatically but requires a new pull on the trigger to fire.

The language of section 924(c) is set forth in full in an addendum to this decision along with a prior version of the same statute. Although section 924 as a whole is captioned "Penalties" and is a companion to section 922 captioned "Unlawful Acts," section 924 is elaborate, lengthy and far from homogenous in character. Subsection (a) sets penalties for specific violations of section 922; subsection (b) creates an offense for transporting weapons. Our main concern is with subsection (c).

Section 924(c) provides that anyone who in relation to a crime of violence or drug trafficking "uses or carries a firearm," or "possesses" one "in furtherance of" the crime, must be sentenced to at least five years imprisonment. 18 U.S.C. § 924(c)(1)(A). It then hikes the minimum if the firearm is "brandished" (seven years), *id.* § 924(c)(1)(A)(ii), or discharged (ten years), *id.* § 924(c)(1)(A)(iii), or if the firearm is a short-barreled rifle or shotgun (ten years), *id.* § 924(c)(1)(B)(i), or is a machine-gun or destructive device or is equipped with a silencer or muffler (thirty years), *id.* § 924(c)(1)(B)(ii).

The defendants moved to strike the specific reference to the Cobray pistol from count three on the ground that possession of a machine-gun is an element of a crime, properly charged as a separate offense in count four. The government objected, insisting that the machine-gun provision set forth a sentencing factor. It said that it did not seek punishment on both counts but had included count four only as a precaution in case the machine-gun reference were struck from count three.

At the pretrial conference, the district court ruled that machine-gun possession was an element of a crime rather than a sentencing enhancement. It relied on *Castillo* v. *United States*, 530 U.S. 120 (2000), a decision

construing an earlier version of the statute that was supplanted by the present law in 1998. *Id.* at 125. The district court dismissed count four at the government's behest, and the defendants then pled guilty to the remaining counts.

The dismissal of count four came about because the government concluded that it could not prove beyond a reasonable doubt the defendants' knowledge that the Cobray had been modified to operate automatically. However, at sentencing the government again urged the thirty year mandatory minimum on the ground that the district court could find the necessary facts as to possession of a machine-gun by a preponderance of the evidence and without requiring the defendants to know that the weapon was automatic. The district judge refused, adhering to his earlier view of the statute.

Accordingly, although the defendants had pled guilty under count three to using or carrying a firearm in connection with a crime of violence, the fact that the Cobray pistol had tested as an automatic weapon was not enough to trigger the thirty year minimum. Two of the defendants (O'Brien and Burgess) ended up with sentences below thirty years; the third had yet to be sentenced when the briefs were filed. Arguing that the thirty year provision was a mandatory sentencing factor, the government now appeals.

Construing section 924(c) is a question of law to be considered *de novo*. *Berhe* v. *Gonzales*, 464 F.3d 74, 80 (1st Cir. 2006). Six circuits support the government's view and only one, *United States* v. *Harris*, 397 F.3d 404, 406, 412-14 (6th Cir. 2005), supports the defen-

dants.[2] But the Supreme Court, glossing an earlier version of section 924(c), found that the machine-gun provision created an element of the offense to be submitted to the jury. *Castillo*, 530 U.S. at 121, 123, 131. At the time, the new version (at issue in our case) had already been enacted but did not govern *Castillo* itself and was not interpreted by the Court.

Ordinarily, Congress can decide whether a fact is an element of the offense or pertains merely to sentencing. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998). Read in a vacuum, the language of section 924(c) indicates that the "offense" (carrying a five year minimum sentence) is the carriage, use or possession of a firearm during a drug or violent felony—all elements for the jury—while the brandishing or discharge and the type of firearm—which merely raised the mandatory minimum—pose sentencing issues to be resolved by the judge.

This would comport with the statute's structure as well.[3] According to the Supreme Court in *Harris* v. *United States*:

> Federal laws usually list all offense elements "in a single sentence" and separate the sentencing factors "into subsections." . . . When a statute has this sort

---

[2] *United States* v. *Cassell*, 530 F.3d 1009, 1016-17 (D.C. Cir. 2008); *United States* v. *Ciszkowski*, 492 F.3d 1264, 1268 (11th Cir. 2007); *United States* v. *Gamboa*, 439 F.3d 796, 811 (8th Cir. 2006); *United States* v. *Avery*, 295 F.3d 1158, 1169-71 (10th Cir. 2002); *United States* v. *Harrison*, 272 F.3d 220, 225-26 (4th Cir. 2001); and *United States* v. *Sandoval*, 241 F.3d 549, 550 (7th Cir. 2001).

[3] Indeed, the *Castillo* Court acknowledged that the structure of the amended statute supported reading the machine-gun provision as a sentencing factor. *Castillo*, 530 U.S. at 125.

> of structure, we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors.

536 U.S. 545, 552-53 (2002) (citation omitted). The current version of section 924(c) follows just this pattern. The first sentence (down to the semi-colon) sets forth the elements that the jury should find and the corresponding five year minimum sentence; then, the subsequent subparagraphs increase the mandatory minimum under various circumstances, which could readily be established at sentencing.

At present, no constitutional bar exists to such an allocation of tasks by Congress. In the face of escalating maximum sentences, the Supreme Court has ruled that the Sixth Amendment requires that any fact increasing the statutory *maximum* sentence be submitted to the jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). But it has not extended this prescription to facts that create or enlarge a statutory *minimum* sentence, which is what concerns us here. *See McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Harris*, 536 U.S. at 557-568 (reaffirming *McMillan*).

However, in sentencing it is imprudent to read Congress' language in a vacuum. The Supreme Court's innovative constitutional precedents, bringing the Sixth Amendment to bear on maximum sentences and (more famously) on the sentencing guidelines, *e.g.*, *United States v. Booker*, 543 U.S. 220 (2005); *Blakely* v. *Washington*, 542 U.S. 296 (2004), has been paralleled in statutory construction. There, the Court has developed unique policy and historical tests that complement, and sometimes work to modify, the most straightforward reading of language and structure.

These tests consider, along with legislative language and intent, the severity of punishment and how the fact has been historically treated. Two leading cases are *Jones* v. *United States*, 526 U.S. 227 (1999) ("serious bodily injury" resulting from a carjacking, 18 U.S.C. § 2119, is an element of the crime) and *Castillo* itself. Several times the outcome, as in both of these cases, has been to require courts to treat facts specified in the substantive statutes as elements of the offense rather than sentencing factors even though bare statutory language might seem to point the other way.[4]

Although in this new algorithm congressional language and other evidences of intent remain important, *Harris*, 536 U.S. at 552, there is a further complication: Congress in enacting complex criminal statutes rarely considers explicitly whether some designated fact should be deemed an element or a sentencing factor—a distinction, after all, primarily of concern to courts in administering the statutes. Exceptions are relatively few. *E.g.*, 18 U.S.C. § 3593(b) (factors bearing on imposition of death sentence).

As for the Court's own criteria, they are not easily applied or balanced against each other. For example, the Court tells us—seemingly as a policy consideration—that a significantly longer prison term points toward treating the triggering fact as an element of the crime; this very circumstance was cited in *Castillo* as one factor supporting the result. 530 U.S. at 131. A

---

[4] The same policy and historical factors have also sometimes led the Court to the opposite result. *See Almendarez-Torres*, 523 U.S. at 229-47 (recidivism provision of 8 U.S.C. § 1326(b)(2) is a sentencing factor); *Harris*, 536 U.S. at 552-56 (brandishing provision of section 924(c) is a sentencing factor).

thirty-year minimum is indeed long; but only a five-year increase would result if a short-barreled rifle were the weapon, and *both* provisions are phrased in exactly the same terms and in structurally parallel provisions. *Compare* 18 U.S.C. § 924(c)(1)(B)(i), *with id.* § 924(c)(1)(B)(ii).

The Court has also asked whether treating a fact as an element was "traditional" and whether doing so would "complicate a trial or risk unfairness." *Castillo*, 530 U.S. at 126-28. Discerning a "tradition" in this sphere is far from easy: until the 1980s, sentencing was largely unstructured; but *Castillo* said that firearm type is traditionally an element of the offense—a judgment unaffected by the rephrasing of the statute. Nor has the restructuring made it less feasible to ask the jury to determine the nature of the weapon or defendant's knowledge of it.

In all events, a starker reality informs our choice in this case. Whatever uncertainty may attend the Court's criteria and the pattern formed by its precedents, one thing is clear: in *Castillo* the Supreme Court found that the machine-gun provision in the pre-1998 version of section 924(c) created an element of the crime to be tried by a jury. The language used in this earlier version was slightly more favorable to the defendants than the current version but not markedly so, nor was the original language so clear that it preordained the Court's result.

Prior to the 1998 amendment, the language defined the crime in the same language used now, prescribed a fixed sentence of five years, and—after listing other facts leading to fixed terms—said that the penalty "if the firearm is a machinegun . . . [is] imprisonment for

thirty years." 18 U.S.C. § 924(c)(1) (1997). The current version merely breaks what was a single run-on sentence into subparagraphs (one for each additional fact), converts the fixed-term sentences of the earlier version into minimum sentences, and moves the verb to the end of each subparagraph, to wit:

> (B) If the firearm possessed by a person convicted of a violation of this subsection—
>
> . . .
>
> (ii) is a machinegun . . . , the person shall be sentenced to a term of imprisonment of not less than 30 years.

There is no evidence that the breaking up of the sentence into the present subdivisions or recasting of language was anything more than the current trend—probably for ease of reading—to convert lengthy sentences in criminal statutes into subsections in the fashion of the tax code. In fact, the stated objective of rewriting section 924(c) was another issue entirely.[5] Nothing in the legislative history that we could find says anything about the element versus sentencing factor distinction.

The only explicit substantive difference between the earlier version and the new one is the conversion of the

---

[5] The debates and hearings focus on Congress' aim to criminalize "mere" possession of firearms after the Supreme Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), which had held that "use" of a firearm required the government to show active employment of the weapon. *See, e.g., Examining the Bailey Decision's Effect on Certain Prosecutions of Violent and Drug Trafficking Crimes: Hearing Before the Committee on the Judiciary of the United States Senate*, 104th Cong. (1996).

numerical figures from fixed-term sentences to mandatory minimums. The government says that mandatory minimums are traditionally associated with sentencing. But so are prescribed sentences (as in the prior version) and maximum sentences (which are components of most criminal statutes). It would be a different matter if Congress had explained the change as one aimed at *Castillo* itself; but *Castillo* was decided after the new statute had been passed.

Absent a clearer or more dramatic change in language or legislative history expressing a specific intent to assign judge or jury functions, we think that *Castillo* is close to binding. True, the Court in *Castillo* declined to decide our case, only saying that the new version could not be used to impute a meaning to the old. 530 U.S. at 125. But most of the reasoning offered in *Castillo* applies with almost equal force to the new statute. If Castillo is to be reconsidered or narrowly distinguished, this is customarily the Court's "prerogative." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997).

We recognize that six circuits have reached a different outcome and concede that, if we were writing on a clean slate, the statute's language would be a powerful argument for the government's result. The problem is that the *prior* statutory language also favored the government. Yet a unanimous Supreme Court found persuasive contrary arguments of policy and tradition, which have not in the least been altered by the statute's revision.

Affirmed.

ADDENDUM

Before the statute was restructured, the pertinent part of 924(c) read as follows:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. (FOOTNOTE 1) Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

Following revision in 1998, the relevant language now reads:

> (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection—
>
> (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2312

UNITED STATES OF AMERICA, APPELLANT

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,
DEFENDANTS-APPELLEES

Entered: Sept. 23, 2008

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc: Mr. Feeley, Ms. Hill, Ms. Chaitowitz, Ms. Feldman Rumpler, Ms. O'Connell, Mr Lang & Mr. Richardson

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 1:05-cr-10183-MLW

UNITED STATES OF AMERICA

v.

DENNIS QUIRK AND MARTIN O'BRIEN AND
ARTHUR BURGESS

Monday, Apr. 2, 2007

PLEA HEARING

---

* * * * *

THE COURT: Okay. Well, let's get to that point.

All right. As I told you earlier this morning, with regard to the 18 United States Code Section 924(c)(1)(b)(2) question, I've decided that proving a machine gun, as required by that statutory provision, is an element of the offense, not a sentencing factor. Essentially, I agree with the reasoning of the Sixth Circuit in ***Harris***, 397 F.3rd 404. I respectfully disagree with the reasoning of the Seventh Circuit in ***Sandoval***, 241 F.3rd 549, which found that the Section 924(c)(1)(b)(1) requirement of a semiautomatic assault weapon was a sentencing factor.

My analysis is not inconsistent with the cases which find that the factual issues identified in Section 924(c)(1)(a) are sentencing factors. Those are cases like ***Pounds***, 230 F.3rd at 1370 and 1319, in which the Eleventh Circuit found that the discharge of a weapon was a sentencing factor, or ***Barton***, 257 F.3rd 443, a Fifth Circuit case finding that brandishing is a sentencing factor.

As the Supreme Court explained in ***Castillo***, 530 U.S. 120 at 126, the way a gun is used, such as brandishing, is a traditional sentencing factor. The Supreme Court also stated, in ***Castillo***, however, that the nature of the weapon, including the distinction between a pistol and a machine gun, is usually a substantive matter and the nature of the weapon is therefore traditionally an element of the offense.

My analysis is consistent with this traditional treatment of the nature of the weapon as an element of the offense, but does not rely exclusively on it. ***Castillo*** was decided in 2000, however, it interpreted a pre1998 version of Section 924(c) which had "brandishing" and "the nature of the weapon" in the same subsection. The 1998 amendment puts factors relating to the way the weapon was used in Section 924(c)(1)(a) and issues concerning the nature of the weapon in Section 924(c)(1)(b). ***Castillo*** explains the considerations for analysis in deciding whether a machine gun is an element of the offense or a sentencing factor. I note that the Sixth Circuit in ***Harris*** considered all of the factors discussed in ***Castillo***, the Seventh Circuit in ***Sandoval*** did not.

Pursuant to ***Castillo***, I've looked first at the language of the statute. It does not clearly resolve the issue of whether a machine gun—that proving a machine gun is an element of the offense or a sentencing factor.

The structure of the statute favors the conclusion that "machine gun" is an element, not a sentencing factor. If it were only a sentencing factor, it could and should have been listed under Section 924(c)(1)(a) with the traditional sentencing factors like "brandishing." Instead, including "machine gun" in Section 924(c)(1)(b) manifests an understanding of the traditional distinction between the way a weapon is used and the nature of the weapon itself.

As the Supreme Court stated in ***Castillo***, "Congress legislates against a backdrop of traditional treatment of certain categories of important facts." (Phone rings.) "The manner in which a crime is carried out, such as whether the weapon was brandished, is a traditional sentencing factor. However, the distinction between weapons, for example, between pistols and machine guns, is, according to the Supreme Court, typically substantive because it relates to the heart of the crime at issue. Asking a jury to decide if the defendant used or carried a machine gun would merely complicate a trial or risk unfairness." Indeed, in this case, the government has been willing to have the issue of whether the weapon in dispute was a machine gun put to the jury even if it is a sentencing factor.

I assume, however, that a special verdict form could address the problem of uncertainty discussed in ***Castillo***. When as here the defendants are charged with using several weapons, the First Circuit approved the use of such a special verdict form with interrogatories in ***Melvin***, 27 F.3d 710 at 716. However, as in ***Castillo***, at Page 131, the length and severity of the added mandatory sentence, 30 years if it's a machine gun as opposed to 5 years, weighs in favor of finding that a machine gun

is an element of the offense. The rule of lenity, as the Supreme Court explains, reinforces this conclusion.

Therefore, I find that "machine gun" is an element of the offense. The government acknowledges that if "machine gun" is an element of the offense, it must prove a defendant knew it was a machine gun. The government acknowledges it cannot prove that required knowledge. Therefore, the Government has previously told me it would request that I dismiss Count 4 if I find that a machine gun is an element of the offense rather than a sentencing factor, and I will grant such a motion momentarily.

Once again, I note that if the First Circuit or the—I guess I'll stop right there.

In the circumstances, does the government request that Count 4 be dismissed and will it accept the plea to the remaining—

MR. FEELEY: Yes, it does. Your Honor, we'll file an electronic version of a dismissal requesting leave of court on the basis of—

THE COURT: Well—and, in fact, we've been through this. I'll accept the oral motion. It can be memorialized in writing. But I'm allowing the motion now. So Count 4 is dismissed with regard to each of the three defendants. * * *

* * * * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2312

UNITED STATES, APPELLANT

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,
DEFENDANTS-APPELLEES

Entered: Jan. 26, 2009

ORDER OF COURT

Before: LYNCH, Chief Judge, TORRUELLA, BOUDIN, LIPEZ, DOMINGUEZ*, DYK**, HOWARD Circuit Judges.

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it

---

* Of the U.S. District Court of Puerto Rico sitting by designation.

** Of the U.S. Court of Appeals for the Federal Circuit sitting by designation.

is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc:

Dina Michael Chaitowitz
Timothy Q. Feeley
Leslie Feldman-Rumpler
James Francis Lang
Timothy Patrick O' Connell
Robert Edward Richardson

OPPOSITION BRIEF

No. 08-1569

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT ARTHUR BURGESS

JEFFREY T. GREEN
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LESLIE FELDMAN-RUMPLER
Counsel of Record
101 Tremont Street
Suite 708
Boston, MA 02108
(617) 728-9941

TACY F. FLINT
JEREMY G. MALLORY
SEAN A. SIEKKINEN
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Respondent Arthur Burgess

January 14, 2010

[Additional Counsel Listed on Inside Cover]

JUDITH H. MIZNER
ASSISTANT FEDERAL
PUBLIC DEFENDER
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
DISTRICT OF MASSACHUSETTS
51 Sleeper Street, 5th Floor
Boston, MA 02110
(617) 223-8061

QUESTION PRESENTED

In *Castillo* v. *United States*, 530 U.S. 120 (2000), this Court unanimously held that, under a previous version of 18 U.S.C. § 924(c)(1), firearm type was an offense element that had to be proven to a jury beyond a reasonable doubt, when a finding that the firearm was a machinegun increased the mandatory consecutive sentence from five to thirty years. The question presented in this case is whether, under the statute as amended in 1998, firearm type remains an offense element when a finding that the firearm is a machinegun increases the mandatory minimum consecutive sentence from five to thirty years.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL PROVISIONS INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. SECTION 924(c)(1)(B) DEFINES MACHINEGUN POSSESSION AS A SEPARATE CRIME	10
A. The Language And Structure Of The Amended Statute Support The Conclusion That § 924(c)(1)(B) Describes An Offense Element	11
B. The Nature And Traditional Treatment Of A Specific Factor And Whether Steeply Higher Penalties Result From The Presence Of That Factor Are Controlling	21
II. THE GOVERNMENT'S INTERPRETATION OF § 924(c)(1)(B) IS INCONSISTENT WITH CONSTITUTIONAL REQUIREMENTS	29
A. Constitutional Limitations Prevent Congress From Relabeling Elements As Sentencing Factors	31

TABLE OF CONTENTS—continued

Page

B. This Court's Decision In *Harris* Is Not To The Contrary 36

C. To The Extent *McMillan* and *Harris* Would Permit The Government's Interpretation, They Should Be Overturned 36

D. Reading § 924(c)(1)(B) To Contain Sentencing Factors Would Violate The Respondents' Fifth And Sixth Amendment Rights In This Case 40

CONCLUSION 43

APPENDIX 1a

18 U.S.C. § 924(c) 1a

TABLE OF AUTHORITIES

CASES Page

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 14
Bailey v. *United States*, 516 U.S. 137 (1995) 1
Blakely v. *Washington*, 542 U.S. 296 (2004) 30, 31, 42
Castillo v. *United States*, 530 U.S. 120 (2000) ..... *passim*
Corley v. *United States*, 129 S. Ct. 1558 (2009) 12
CTS Corp. v. *Dynamics Corp. of Am.*, 481 U.S. 69 (1987) 38
Cunningham v. *California*, 549 U.S. 270 (2007) 26, 42
Dean v. *United States*, 129 S. Ct. 1849 (2009) 18, 20, 29
Finley v. *United States*, 490 U.S. 545 (1989) 16, 27
Gall v. *United States*, 552 U.S. 38 (2007) 25, 36, 40, 42
Harris v. *United States*, 536 U.S. 545 (2001) ..... *passim*
In re Ondras, 846 F.2d 33 (7th Cir. 1988) 17
In re Winship, 397 U.S. 358 (1970) 31
Jones v. *United States*, 526 U.S. 227 (1999) ..... *passim*
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) ..... *passim*
Merrill Lynch v. *Dabit*, 547 U.S. 71 (2006) 12
Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 10, 31, 32
Rita v. *United States*, 551 U.S. 338 (2007) 40, 41, 42

TABLE OF AUTHORITIES—continued

	Page
Staples v. *United States*, 511 U.S. 600 (1994)	22
United States v. *Alaniz*, 235 F.3d 386 (8th Cir. 2000)	28
United States v. *Avery*, 295 F.3d 1158 (10th Cir. 2002)	20
United States v. *Gamboa*, 439 F.3d 796 (8th Cir. 2006)	20
United States v. *Gradwell*, 243 U.S. 476 (1917)	29
United States v. *Harrison*, 272 F.3d 220 (4th Cir. 2001)	19
United States v. *Sandoval*, 241 F.3d 549 (7th Cir. 2001)	19, 20
United States v. *Santos*, 128 S. Ct. 2020 (2008)	29
United States v. *Studifin*, 240 F.3d 415 (4th Cir. 2001)	28
United States v. *Tidwell*, 521 F.3d 236 (3d Cir.), *cert. denied*, 129 S. Ct. 762 (2008)	17, 18
Zadvydas v. *Davis*, 533 U.S. 678 (2001)	31

STATUTES AND CODES

18 U.S.C. § 521	12, 17
§ 831	17
§ 921(23)	4
§ 922	3, 22
§ 924	*passim*
§ 1201(a)	25, 26
§ 1951	3
§ 2113	12, 13
§ 2241	26
§ 2251	26

TABLE OF AUTHORITIES—continued

	Page
§ 2252	26
§ 2421	26
§ 2423	26
§ 2511	13
21 U.S.C. § 841(b)	18
§ 848	12, 17, 25, 26
§ 861(b)	13
26 U.S.C. § 5845	4, 22
D.C. Code Ann. § 22-4514	22
Mass. Gen. Laws Chapter 265, § 26A (1933)	26
Ohio Rev. Code Ann. § 2905.01(A)(4) (2009)	26
Ohio Rev. Code Ann. § 2923.11(K).	22
Ohio Rev. Code Ann. § 2923.17(A)	22
Or. Rev. Stat. § 166.272	22
R.I. Gen. Laws § 11-26-1.4 (1956)	26
Utah Code Ann. § 76-5-301 (1953)	26
Wash. Rev. Code Ann. § 9.41.190	23

LEGISTLATIVE HISTORY

143 Cong. Rec. S105 (1997)	27
144 Cong. Rec. H10330-01 (1998)	27, 28
144 Cong. Rec. S12670 (1998)	28
H.R. Rep. No. 105-344 (1997)	27

OTHER AUTHORITIES

U.S. Sent'g Comm'n, *Monitoring of Criminal Sentences, 2008* (2009)	11
U.S.S.G. § 2A3.1(b)(4)	23
U.S.S.G. § 2A1.1(b)(2)	23
U.S.S.G. § 2B3.1(b)(3)	23
U.S.S.G. § 2K2.1(b)(5)	23

TABLE OF AUTHORITIES—continued

Page

U.S.S.G. § 2K.2.4 ..... 25, 36
U.S.S.G. § 5K2.2 23

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . and to be informed of the nature and cause of the accusation.

Section 924(c) of Title 18 of the United States Code is reproduced in an appendix to this brief.

INTRODUCTION

When Congress amended 18 U.S.C. § 924(c) in 1998 to address the effect of *Bailey* v. *United States*, 516 U.S. 137 (1995), on "use and carry offenses," it reorganized the statute but did not reduce firearm type to a sentencing factor. In construing the prior version of the statute in *Castillo* v. *United States*, 530 U.S. 120 (2000), the Court unanimously held that firearm type was an element of the offense set forth in § 924(c), consistent with past practice and with the Court's view of the nature of firearm type. *Id.* at 131. The reasoning of *Castillo* still applies to this case. The Court's decision in *Harris* v. *United States*, 536 U.S. 545 (2001), on its own terms, neither applies to the provisions at issue here nor to the special punishment imposed.

Two features of the amended statute's language and structure make this clear. *First*, the introductory language of subparagraph (B) of § 924(c)(1), concerning a conviction of a violation "of this subsection," refers to § 924(c) as a whole, and not solely subparagraph (A). Thus, the additional elements introduced in subparagraph (B), which are part of the offense described in "this subsection," are just that: elements of an aggravated offense. *Second*, Congress's decision to separate firearm type from brandishing and discharging, placing the latter in clauses (ii) and (iii) of subparagraph (A) and the former in subparagraph (B), strongly supports the conclusion that firearm type is an element. It indicates that Congress differentiated firearm type, which this Court has said goes to the heart of the offense, from other facts that this Court has previously held are sentencing factors.

The amendments made only one substantive change to the sentence where the firearm is a machinegun: the thirty-year mandatory sentence from the prior version became a thirty-year mandatory minimum sentence in the amended one. By any measure, the increase from a mandatory minimum sentence of five years to one of thirty years is significant.

The government's construction of § 924(c) also raises grave and doubtful constitutional questions about the deprivation of jury trial and due process rights. Those concerns are not eliminated by the addition of three words—"not less than"—to prescribe an entirely new level of punishment based upon judge-found facts on a preponderance standard. The government's policy concerns, which were never expressed by Congress in enacting the 1998 amendments, also do not provide an answer.

Streamlining guilt-stage proceedings may solve the claimed problems of proof, but the Constitution does not tolerate a shortcut to judgment at the expense of defendants' rights.

STATEMENT OF THE CASE

The defendants pled guilty to a § 924(c) charge with no admission that any of the firearms involved was a machinegun. J.A. 39-42, 56. They admitted at the Rule 11 colloquy that a firearm was brandished. *Id.* at 43. At sentencing, the government moved for an upward departure pursuant to § 5K2.6 of the United States Sentencing Guidelines, based on the dangerousness of the weapons. J.A. 47; see also Gvt. C.A. App. 209, 231-32. But, despite its advocacy for a thirty-year mandatory minimum sentence based on firearm type, the government chose to recommend a twelve-year sentence on the § 924(c) count. Gvt. C.A. App. 209. Twelve years was five years above the applicable mandatory minimum for brandishing under § 924(c)(1)(A), and eighteen years below the thirty-year sentence the government now seeks to impose post-judgment through statutory interpretation.

Trial Court Proceedings

The defendants were charged in July 2005 with, *inter alia*, Hobbs Act violations, 18 U.S.C. § 1951, and using, carrying, and/or possessing firearms in furtherance of a crime of violence, 18 U.S.C. § 924(c). J.A. 19-21. Prosecutors alleged that Dennis Quirk, Jason Owens, Martin O'Brien, and Arthur Burgess conspired and attempted to rob an armored car as it made a scheduled delivery of cash to a bank in the

North End of Boston, Massachusetts.[1] *Id.* The indictment identified three firearms involved in the offense: an AK-47, a Sig-Sauer, and a Cobray pistol. *Id.*

The case was set for trial on April 2, 2007. Five weeks earlier, prosecutors had obtained a second superseding indictment, adding a second § 924(c) count, Count IV, to allege that the Cobray pistol was a "machinegun" for purposes of § 924(c).[2] J.A. 9, 20-21. The Cobray remained one of the three firearms identified in Count III, in which § 924(c) was originally charged. *Id.* at 19-21.

Defense counsel moved to strike the Cobray from Count III, asserting that firearm type was an element of the § 924(c) offense and therefore properly charged only in a separate count, as it was in Count IV. *Id.* at 10. Prosecutors responded that the government would move to dismiss Count IV, regardless of which way the court ruled. *Id.* at 51-52. They reasoned that, if the District Court agreed with the government that firearm type was not an offense element, then Count IV was unnecessary. *Id.* If,

---

[1] Mr. Owens, Mr. Burgess, and Mr. Quirk were also charged with possession of a firearm by a previously convicted felon in violation of 18 U.S.C. § 922(g)(1). J.A. 19-21.

[2] The term "machinegun" is defined for purposes of § 924(c)(1)(B)(ii) as "any weapon which shoots . . . automatically more than one shot without manual reloading, by a single function of the trigger." 18 U.S.C. § 921(23); 26 U.S.C. § 5845(b). This definition does not include firearms that fire in semiautomatic mode, as they automatically chamber additional rounds, but require additional pulls of the trigger to fire. Pet. App. 2a n.1. Notably, the presentence report states: "The Cobray, however, although originally manufactured to fire in semi-automatic mode, in fact fired fully automatically *when test-fired at the FBI Laboratory*." J.A. 45 (emphasis added).

however, the District Court concluded that firearm type was an offense element, they conceded that Count IV was not viable because the government could not prove that the defendants had known that the Cobray pistol was a "machinegun." *Id.*

On the day trial was to begin, the District Court agreed with the defendants and held that firearm type was an element. *Id.* at 39-42, 56. Prosecutors then moved to dismiss Count IV, which the District Court granted. *Id.* The defendants subsequently changed their pleas to guilty to the remaining charges (without plea agreements). *Id.* They acknowledged their understanding that the mandatory minimum sentence on the § 924(c) count was seven years, as a firearm was brandished during the robbery attempt. *Id.* at 43. The defendants made no admission in any form that any of the firearms was a machinegun.[3] *Id.*

Prosecutors made a written objection to the District Court's ruling that firearm type is an offense element. *Id.* at 45-48. But at sentencing they never asked the District Court to sentence the defendants to the thirty-year mandatory minimum term set forth in § 924(c)(1)(B)(ii) for use of a "machinegun." *Id.* Instead, they moved for an upward departure and recommended that Mr. Burgess and Mr. O'Brien each receive a twelve-year sentence on the § 924(c) count.

---

[3] Prosecutors described the Cobray at the plea hearing only as a "9 millimeter pistol" and a "real firearm." Gvt. C.A. App. 179-80. At sentencing, prosecutors admitted that "there's nothing on [the Cobray] that says 'I am a machinegun' or 'I fire in automatic mode,' but the fact of the matter is that it does." J.A. 48.

to run consecutively to the sentences on the other counts.[4] *Id.*; see also Gvt. C.A. App. 209.

The District Court sentenced Mr. Burgess to a consecutive seven-year sentence on the § 924(c) count, for a total sentence of twenty-two years. Gvt. C.A. App. 51-56, 232-48. It likewise sentenced Mr. O'Brien to a consecutive eight-and-one-half-year sentence on that count, for a total sentence of fifteen years. *Id.* The sentencing court made no finding as to whether the Cobray fired in fully automatic mode at the time of the offense, and prosecutors made no request for a finding on that issue.[5] *Id.*; see also J.A. 45-48.

First Circuit Appeal

The First Circuit subsequently affirmed the District Court's judgment. Applying the factors set forth in *Jones* and *Castillo*, and citing *Harris*, it observed that, "[r]ead in a vacuum, the language of [§] 924(c) indicates that the offense is defined as the use, carriage, or possession of a firearm during a drug or violent felony, and that brandishing, discharge, and

---

[4] The sentencing judge invited the government to make a recommendation as to a "reasonable" sentence on the § 924(c) charge. Gvt. C.A. App. 207-09. The prosecutor responded: "[T]he government's recommendation, in terms of a concrete number, [is] for an additional 60 months for each defendant on the 924(c) charge." *Id.* "[I]n this case we're seeking a total of 12 years to run consecutively with respect to Count 3." *Id.*

[5] Because prosecutors never requested—and the sentencing court never made—a finding that the firearm was a "machinegun," there would be no basis to impose the thirty-year mandatory minimum sentence under § 924(c)(1)(B) even if the judgment below is reversed and that provision is deemed to set forth sentencing factors rather than offense elements. For that reason, dismissal of the petition as improvidently granted may be warranted.

the type of firearm are all sentencing factors." Pet. App. 5a. However, the First Circuit refused to read the statute in a vacuum, based on this Court's precedent. See *id.*

The First Circuit looked to *Castillo*. Suggesting that the language and structure of the prior version of the statute were slightly more favorable to the government's interpretation, it viewed the changes as falling short of a clear statement of congressional intent to make firearm type a sentencing factor. *Id.* at 5a-10a. "It would be a different matter," the panel remarked, "if Congress had explained the change as one aimed at *Castillo* itself; but *Castillo* was decided after the new statute had been passed." *Id.* at 10a.

The First Circuit viewed the change to a multi-subpart structure as part of a recent trend in statutory drafting. *Id.* The only substantive change, it noted, was the conversion of fixed sentences to mandatory minimums of the same length. *Id.* It concluded that these changes did not amount to a clear statement of congressional intent to change the status of firearm type.

SUMMARY OF ARGUMENT

In holding the firearm types specified in § 924(c)(1)(B) to be offense elements, the First Circuit followed the language and structure of the statute rather than the flawed interpretations of the opinions of several other courts of appeals which have interpreted the statute. There is no evidence in the statute itself or the legislative history of the 1998 amendments that Congress intended to change firearm type—a traditional offense element—into a mere sentencing factor. The First Circuit rightly refused to infer a substantive change of such

constitutional dimension from the stylistic reorganization of the statute's text. The contrary conclusion reached by other courts is based on a misreading of the statute's structure and a cursory analysis of the amended statute that elevates form over substance and ignores other relevant criteria articulated by this Court.

If Congress intended § 924(c)(1)(B) to define sentencing factors relevant to a predicate conviction under § 924(c)(1)(A), the introductory phrase of subparagraph (B) would specifically refer to the previous subparagraph as a complete, standalone offense, as penalty provisions typically do. Instead, § 924(c)(1)(B) refers more generally to a violation of "this subsection"—meaning § 924(c) as a whole—thus encompassing the firearm characteristics in subparagraph (B) as elements of the offense to which the sentences prescribed in that subparagraph apply. Therefore, contrary to the government's suggestion, the language of subparagraph (B) presumes a finding of guilt not under the previous subparagraph, but rather under subparagraphs (A) and (B) together, supporting the conclusion that subparagraph (B) defines offense elements rather than sentencing factors.

The structure of § 924(c) strengthens, not weakens, this interpretation. The 1998 amendments moved firearm type to an independent subparagraph, separate and apart from the sentencing factors defined in clauses (i) through (iii) of § 924(c)(1)(A). The government suggests, that the location of the firearm-type provisions between sentencing factor subparagraphs means that they too are sentencing factors. This argument rests on the assumption that statutes conform to a formula whereby elements are listed first, followed by sentencing factors. That

assumption is contradicted by the reality, both in § 924(c) and elsewhere in the criminal statutes.

The nature and traditional treatment of firearm type further suggest that subparagraph (B) sets forth offense elements. This Court observed in *Castillo* that firearm type is a traditional offense "element," which lies close to the heart of the crime. 530 U.S. at 126-27. The fact that § 924(c) was amended in no way diminishes the significance of this observation. Nor does it diminish the stark disparity of the six-fold increase from five to thirty years in prison for possession of a machinegun, which *Castillo* emphasized in holding that firearm type is an offense element.

The government's attempt to dismiss this disparity on grounds that a sentencing judge technically has discretion to impose a sentence of thirty years regardless of firearm type ignores the reality of sentencing. The sentencing guidelines, reasonableness review, and common practice ensure that the minimum sentences prescribed by § 924(c) roughly define defendants' actual sentences in most cases. The length and severity of the punishments prescribed by § 924(c)(1)(B) drastically exceed the sort of incremental enhancements which this Court has deemed sentencing factors, to such a degree that firearm type would become the tail wagging the dog of the substantive offense were it construed as a sentencing factor. The foregoing factors cumulatively indicate that firearm type is an element of the offense that must proven to a jury, and to the extent there is any doubt the rule of lenity dictates that this Court err in favor of the defendant.

Even ignoring these considerations, the doctrine of constitutional avoidance precludes the government's proffered interpretation of the statute. It is well

established that Congress cannot circumvent constitutional guarantees simply by relabeling a fact necessary for conviction a sentencing factor. *E.g.*, *Mullaney* v. *Wilbur*, 421 U.S. 684, 698 (1975). Congress cannot, consistent with the Fifth and Sixth Amendments, eviscerate the need for a jury or proof beyond a reasonable doubt on the issue of whether a firearm is a "machinegun" for purposes of § 924(c). *E.g.*, *Jones* v. *United States*, 526 U.S. 227, 239-50 (1999). The government's brief is conspicuously silent on this obvious constitutional issue, which has been acknowledged by this Court in several fractured opinions, including *Harris*. See 536 U.S. at 556-68.

ARGUMENT

I. SECTION 924(c)(1)(B) DEFINES MACHINEGUN POSSESSION AS A SEPARATE CRIME.

In three cases decided between 1999 and 2002, *Jones*, *Castillo*, and *Harris*, this Court established an analytical framework to answer the question presented here: namely, whether a statutory provision describes an offense element or a sentencing factor where the statute does not expressly delegate the factfinding function to either judge or jury. *Harris*, 536 U.S. at 552-56; *Castillo*, 530 U.S. at 123-31; *Jones*, 526 U.S. at 232-39; see also *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). In all three cases, language and structure were starting points for this Court's analysis, but they were never the sole factors determining the outcome. *E.g.*, *Castillo*, 530 U.S. at 123-31. The Court identified other, specific factors as critical to the analysis, most importantly: the nature and traditional treatment of the fact at issue, and the impact on sentencing. *Id.* Other factors were also

considered, including legislative history and the rule of lenity. *Id.* Each of these factors indicates that the firearm-type provisions in § 924(c)(1)(B) remain, as they were before the 1998 amendments, offense elements.

A. The Language And Structure Of The Amended Statute Support The Conclusion That § 924(c)(1)(B) Describes An Offense Element.

1. The Language Of § 924(c) Supports The Conclusion That Congress Intended To Keep Firearm Type As An Offense Element In The 1998 Amendments.

Two words in the introductory phrase of § 924(c)(1)(B) provide a clear signal that the firearm-type provisions contain elements: "[i]f the firearm possessed by a person convicted of a violation of *this subsection* . . . ." 18 U.S.C. § 924(c)(1)(B). The question for this Court is what the words "this subsection" mean in that phrase. As explained below, these words refer to § 924(c) as a whole and not only to § 924(c)(1)(A). It follows that the firearm-type provisions contained in § 924(c)(1)(B) express elements, as they are within "this subsection" which is § 924(c).

Section 924 consistently refers to three major divisions within the statute: "chapter," "section," and "subsection." *E.g.*, *id.* § 924(a)(1)(A). "Chapter" refers to "Chapter 44 Firearms" comprising "sections" 921 through 993, each containing various firearms prohibitions. *E.g.*, *id.* The term "subsection" refers to each of the lower case, lettered divisions of each section. The first sentence of § 924(a)(1), for example, specifies that, "[e]xcept as otherwise

provided *in this subsection, subsection (b), (c), (f), or (p) of this section.*" *Id.* § 924(a)(1) (emphasis added).

Both congressional consistency and the use of this phrase elsewhere in the statute indicate that Congress made a conscious choice to use "this subsection" in subparagraph (B) to refer to § 924(c), rather than to § 924(c)(1)(A) alone. Any other reading runs contrary to interpretive doctrine. See *Merrill Lynch* v. *Dabit*, 547 U.S. 71 (2006) (where the same words are used within a statute, they are presumed to have the same meaning).

If the words "this subsection" were read to refer only to § 924(c)(1)(A), the first sentence of § 924(c)(5) would be superfluous. See *Corley* v. *United States*, 129 S. Ct. 1558 (2009). That paragraph provides for sentences of fifteen years and higher, "[e]xcept to the extent that a greater mandatory minimum sentence is otherwise provided under *this subsection* or by any other provision of law." 18 U.S.C. § 924(c)(5). If "this subsection" were to mean § 924(c)(1)(A), the first sentence of paragraph (5) would serve no purpose, because the sentences provided in § 924(c)(1)(A) are all less than fifteen years. See *id.* § 924(c)(1)(A)(i)-(iii).

Other statutory references to violations of a particular provision of law confirm that Congress typically makes express citation to a specific subsection, paragraph, or subparagraph—unless Congress intends to refer to the larger chapter, section, or subsection. See, *e.g.*, 21 U.S.C. § 848(i), (j), (n) (repealed 2006) (referring to "an offense *under subsection (e)* of this section") (emphasis added); 18 U.S.C. § 521(b) ("Penalty—The sentence of a person convicted of an offense described in *subsection (c)* shall be increased by . . . .") (emphasis added); *id.* § 2113(d) ("Whoever, in committing, or in attempting

to commit, any offense defined in *subsections (a) and (b)* of this section, assaults any person. . . .") (emphasis added); cf. *id.* § 2113(e) ("Whoever, in committing any offense defined in this *section*. . . ."); *id.* § 2511(5)(a)(ii)(A) ("if the violation of this chapter is a first offense for the person *under paragraph (a) of subsection (4)*"); 21 U.S.C. § 861(b) ("Penalty for first offense—Any person who violates *subsection (a)* of this section is subject to . . . .") (emphasis added). Congressional references to various statutory provisions are therefore specific and clear. There is thus no reason to infer that Congress meant something narrower than the whole of § 924(c) when it referred in § 924(c)(1)(B) to a person "convicted of a violation of this subsection."

The government's own choice of words in referring to the various parts of this statute is consistent with ordinary practice, and inconsistent with the interpretation of this phrase that it implicitly urges on the Court. It consistently refers to subparagraphs (A), (B), and (C) not as subsections, but as subparagraphs. See Gov. Br. 9, 18; see also *id.* at 14-15 (referring to "Clauses (B)(i) and (B)(ii)").

The government also suggests that the use of the phrase "shall be sentenced" in the firearm type provisions means that they describe sentencing factors. *Id.* But every criminal statute states the length of the sentence. *E.g.*, 18 U.S.C. § 2113(e). The inclusion of the phrase "shall be sentenced" specifies the enhanced sentence to be imposed after conviction of an aggravated offense. See *Jones*, 526 U.S. at 236. Indeed, this feature of clauses (i) and (ii) of § 924(c)(1)(B) distinguishes them from their counterparts in clauses (ii) and (iii) of § 924(c)(1)(A), which contain no "shall" of their own but instead refer back to the one at the end of § 924(c)(1)(A)(i).

That is not to say that the interpretive process is at an end and that the entirety of subsection (c) sets forth offense elements. Section 924(c)(1)(C), for example, refers to recidivist offenders, a factor the Court has found to be traditionally one for the sentencing court alone in light of the due process and jury trial protections already afforded in the course of the earlier conviction. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 241-47 (1998). Similarly, § 924(c)(1)(D) refers only to probation and consecutive sentences—considerations that are unique to the sentencing process itself. Paragraph (5), as noted however, also articulates aggravated versions of the "use or carry" offense—referencing armor-piercing ammunition and death resulting from the use thereof. *Id.* § 924(c)(5).

2. The Structure Of § 924(c)(1)(B) Supports The Conclusion That Congress Intended Firearm Type To Remain An Offense Element In The 1998 Amendments.

Congress's decision to place the firearm type provisions alone in subparagraph (B), apart from the discharging and brandishing provisions contained in clauses (ii) and (iii) of subparagraph (A), further supports the conclusion that firearm type remains an offense element distinct from the sentencing factors listed in subparagraph (A). See *Jones*, 526 U.S. at 232-39. Subparagraph (B) stands alone in the subsection in referring to firearm type: subparagraph (A) refers only to "a firearm" and to how the "firearm" is used. 18 U.S.C. § 924(c)(1). The government's reading would be plausible, though still not definitive, if the substance of clauses (i) and (ii) of § 924(c)(1)(B) appeared instead in § 924(c)(1)(A), as clauses (iv) and (v), after the brandishing and

discharge provisions. But, of course, that is not the statute Congress wrote.

The government makes no mention of the segregation of firearm-type provisions in subparagraph (B). Instead, it resorts to an argument that this Court rejected in *Jones*: namely, that the statute contains a principal paragraph "followed by the word 'shall,' . . . and finally 'separate subsections,'" that specify sentences. Gov. Br. 17. As the *Jones* Court noted, although the word "shall" "frequently separates offense-defining clauses from sentencing provisions, it hardly does so invariably." 526 U.S. at 234 (citing 18 U.S.C. § 2118(a)(3) as but one example). Elements have been located on either side of the word "shall." *Id.*

The government's structural argument has even less weight here, as the word "shall" appears in subparagraph (B), *after* the additional element of firearm type: "[i]f the firearm . . . is a machinegun . . . the person shall be sentenced to a term of imprisonment of not less than thirty years." 18 U.S.C. § 924(c)(1)(B)(ii). Thus, "shall" is not a divider between elements earlier defined and the provisions in subparagraph (B). Even under the government's theory, the use and placement of the word "shall" in subparagraph (B) indicate that the machinegun provision in fact states a separate, aggravated form of the § 924(c) offense.

The Court's decision in *Harris* is limited to the brandishing provision of § 924(c)(1)(A)(ii), see 536 U.S. at 551, and thus offers little support for the government's reading of the subsection as a whole. The Court viewed the structure of § 924(c)(1)(A) as permitting a presumption, though not mandating a conclusion, that Congress intended to make brandishing a sentencing factor. *Id.* at 552-56. Here,

the question arises from the same version of § 924(c)(1), but in a different subparagraph, with its own unique structure. Subparagraph (A) is a run-on sentence with the word "shall" followed by a dash and a series of clauses. 18 U.S.C. § 924(c)(1)(A). The final clause, § 924(c)(1)(A)(iii), ends in a period, bringing § 924(c)(1)(A) to a close. *Id.* Had Congress intended firearm type to be a sentencing factor, like discharging or brandishing, the placement of the firearm type provisions in subparagraph (B)—separated from the sentencing factors in clauses (ii) and (iii) of subparagraph (A)—and the inclusion of the introductory phrase of subparagraph (B) serve no purpose. See *Jones*, 526 U.S. at 232-39.

The First Circuit offered the most cogent explanation for the change from the single-paragraph structure of the prior version of § 924(c) to a series of subparagraphs in the 1998 amendments. Pet App. 8a-10a. It noted that there was no indication that the alteration of the run-on sentence into its present form evidenced "anything more than the current trend—probably for ease of reading—to convert lengthy sentences in criminal statutes into subsections in the fashion of the tax code." *Id.* at 9a. And, as discussed below, the "stated objective of re-writing [§] 924(c)" was *not* to alter the purpose of the statutory language—which was taken from the opening sentence and moved into subparagraphs—but rather "another issue entirely."[6] *Id.*; see also *Finley* v. *United States*, 490 U.S. 545, 549 (1989) ("Under

[6] As the First Circuit observed, the debates and hearings surrounding the amendment of the statute were focused on Congress's aim to criminalize "mere" possession of firearms after this Court's decision in *Bailey*, which had held that "use" of a firearm required the government to show active employment of the weapon. See Pet. App. 9a n.5.

established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'") (quoting *Anderson* v. *Pacific Coast S.S. Co.*, 225 U.S. 187 (1912)). Far from supporting the government's argument that § 924(c)(1)(B) describes a sentencing factor, the structure of the provision strongly suggests that Congress still intended for it to describe an element of the crime, just as this Court in *Castillo* found it did in the prior version of the statute.

3. The Placement Of The Firearm-Type Provisions Between Subparagraphs Containing Sentencing Factors Does Not Indicate Congressional Intent To Make Firearm Type A Sentencing Factor.

The government attaches significance to the location of subparagraph (B) between subparagraphs (A) and (C), where the latter two contain sentencing factors. Gov. Br. 20. This would certainly not be the first time that legislative drafting, a process famously compared with sausage production,[7] has resulted in a jumble of widely varying provisions, as even a cursory survey of federal criminal statutes shows.[8] That is

---

[7] *See, e.g., In re Ondras*, 846 F.2d 33, 36 (7th Cir. 1988).

[8] *See, e.g.*, 18 U.S.C. § 831(a) (elements); *id.* § 831(b) (penalties); *id.* § 831(c) (elements); *id.* § 831(d) (enforcement); *id.* § 831(e) (enforcement); *id.* § 831(f) (definitions); *id.* § 521(a) (definitions); *id.* § 521(b) (penalty); *id.* § 521(c) (defines offenses by reference to other statutes); *id.* § 521(d) (sentencing factors); *see also* 21 U.S.C. § 848(b)(c). In *United States* v. *Tidwell*, 521 F.3d 236 (3d Cir.), *cert. denied*, 129 S. Ct. 762 (2008), cited by the government, the Third Circuit rejected the defendant's argument that 21 U.S.C. § 848(b) must contain elements

true even when those provisions are "organized" into sections, subsections, subparagraphs, and subparts, with letters and numbers large and small. For example, the Controlled Substances Act, despite its clearly labeled subsections captioned "unlawful acts" and "penalties," contains an element sandwiched between sentencing factors: where "death . . . results" from a controlled substance offense, an aggravated offense with increased maximum penalties exists. See 21 U.S.C. § 841(b). Congress often mixes together elements and sentencing factors without intending to blur the distinction between them.

The government's description of the organization of § 924(c) is, moreover, not entirely accurate. See Gov. Br. 20. The claim that subparagraph (B) is surrounded by sentencing factors glosses over the fact that subparagraph (A) contains elements, see 18 U.S.C. § 924(c)(1)(A), and subparagraph (C) contains the same firearm-type references as subparagraph (B), see *id.* § 924(c)(1)(C)(ii).[3] See also *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009).

---

because § 848(e) states an offense. 521 F.3d at 248. The *Tidwell* opinion noted: "[s]everal other subsections of § 848 refer to § 848(e) as a separate offense." *Id.* (quoting *United States* v. *Nff*, 161 F.3d 663, 675 (11th Cir. 1998)).

[3] Most if not all of the cases cited by the government regarding § 924(c)(1)(C) see Gov. Br. 19 n.5, pertain exclusively to § 924(c)(1)(C)(i), which is a recidivism provision. But § 924(c)(1)(C)(ii) combines recidivism and firearm type

4. The Current Majority Courts Of Appeals View That Firearm Type Is A Sentencing Factor Is Rooted In A Clear Misreading Of The Statute's Structure.

The government suggests that the majority of circuits have applied this Court's approach to statutory interpretation and correctly held that firearm type is a sentencing factor. Gov. Br. 13. To the contrary, the circuit court opinions demonstrate a failure to follow this Court's analytical approach and a fundamental misreading of the amended statute's structure.

The error began with *United States* v. *Sandoval*, 241 F.3d 549 (7th Cir. 2001). The opinion, in a passage relied on by other courts, described the statute as follows:

> [T]he first clause of § 924(c)(1), standing alone, defines the offense . . . while subsections (A) and (B) single out subsets of those persons . . . for more severe punishment.

Id. at 551. In fact, there is no "first clause" of § 924(c)(1) independent of subparagraph (A). The misconstruction is critical. Had § 924(c)(1)(A) and § 924(c)(1)(B) both been subparts of one main paragraph, as *Sandoval* suggests, then the argument that they are structurally similar might have made at least some sense. But they are not: § 924(c)(1)(B) has its own introductory text and its own subparts.

The Fourth Circuit's decision in *United States* v. *Harrison*, 272 F.3d 220 (4th Cir. 2001), reflects similar analytical errors. Noting that the 1998 amendments made the fixed penalties of § 924(c) into mandatory minimums, that court observed:

> [A]s a provision marking out a separate offense, § 924(c)(1)(B) would be incomplete; it sets forth no determinate sentence or even any upper limit on sentencing. It makes sense only as a sentencing factor that cabins a judge's discretion when imposing a sentence for the base offense in [§] 924(c), for which the maximum penalty is life imprisonment.

Id. at 225-26. However, if the absence of an expressly stated maximum sentence makes a statutory provision incomplete, then § 924(c)(1)(A) is incomplete as well—because it also lacks an upper limit on sentencing. See 18 U.S.C. § 924(c)(1)(A). Yet, this Court has concluded that subparagraph (A) contains elements. *E.g.*, *Dean*, 129 S. Ct. at 1853.

These errors are significant because other circuits that have construed the amended version of § 924(c)(1)(B)(ii) have cited to *Sandoval* or *Harrison*, or otherwise relied upon the same flawed reading of the statute. See *United States* v. *Avery*, 295 F.3d 1158 (10th Cir. 2002); *United States* v. *Gamboa*, 439 F.3d 796 (8th Cir. 2006). These courts gave no consideration to the critical factors that ultimately determined this Court's holdings in *Jones*, *Castillo*, and *Harris*. This critical error at the root of the formation of the circuit majority undermines the significance of that majority.

B. The Nature And Traditional Treatment Of A Specific Factor And Whether Steeply Higher Penalties Result From The Presence Of That Factor Are Controlling.

1. Nature And Traditional Treatment.

The nature and traditional treatment of the factual issue was "perhaps the most important [guidepost]" in *Jones*. *Harris*, 536 U.S. at 553. In *Jones*, *Castillo*, and *Harris*, these considerations carried great weight. *Harris*, 536 U.S. at 552-56; *Castillo*, 530 U.S. at 123-31; *Jones*, 526 U.S. at 232-39. Indeed, in each case, the Court's assessment of the traditional treatment of the fact at issue was the same as its conclusion on the ultimate question, whether the provision at issue was an element or a sentencing factor.

In *Jones*, this Court found in federal and state statutes a tradition of treating "serious bodily injury" as an offense element, and held that the Congress had done the same in the carjacking statute. 526 U.S. at 235-236. In *Harris*, this Court held that brandishing, a "paradigmatic sentencing factor," was a question for the sentencing court alone. 536 U.S. at 554. And, in *Castillo*, the Court observed that firearm type has not traditionally been used as a sentencing factor in the context of "use and carry" offenses. 530 U.S. at 126. The Court noted that the difference between various types of firearms, including machineguns and destructive devices, is so great both in degree and kind, that it "concerns the

nature of the element lying closest to the heart of the crime at issue." *Id.* at 126-27.[10]

Congress's treatment of firearm type as an offense element confirms the *Castillo* Court's assessment. Several of the offenses defined in 18 U.S.C. § 922, a section within the same chapter as § 924(c)(1), explicitly make a firearm's characteristics an element.[11] Additionally, the National Firearms Act defines firearm type, including status as a machinegun, as an element with respect to a wide range of violations set forth in 26 U.S.C. § 5861(a) through (j). See 26 U.S.C. § 5845; see also *Staples* v. *United States*, 511 U.S. 600, 602-03 (1994). State legislatures have taken a similar approach.[12] See

---

[10] The *Castillo* Court also considered whether unfairness or confusion would result from submitting the issue of firearm type to a jury rather than a judge, and its answer was no. 530 U.S. at 128. As the lower courts in this case noted, special verdict forms could be used to address any potential problems in this regard.

[11] *See* 18 U.S.C. § 922(a)(4) (prohibiting unlicensed individuals from transporting machineguns, destructive devices, and short-barreled rifles or shotguns in interstate or foreign commerce); *id.* § 922(b)(4) (forbidding licensed individuals from selling or delivering machineguns and similar weapons except as authorized by the Attorney General); *id.* § 922(k) (making it a crime to transport or possess any firearm "which has had the importer's or manufacturer's serial number removed, obliterated, or altered"); *id.* § 922(o) (making it unlawful for any person to "transfer or possess a machinegun"); *id.* § 922(p) (prohibiting certain firearms which are not accurately detected by x-ray devices).

[12] *See, e.g.*, D.C. Code Ann. § 22-4514 (prohibiting unauthorized possession of machineguns, sawed-off shotguns, and other similar weapons); Ohio Rev. Code Ann. §§ 2923.11(K), 2923.17(A) (prohibiting any person from acquiring, having, carrying, or using "dangerous ordnance[s]," including "[a]utomatic or sawed-off firearm[s]"); Or. Rev. Stat. § 166.272

Jones, 526 U.S. at 236 ("[s]tate practice bolsters this conclusion"). Because both Congress and states have routinely treated firearm type as an offense element, this Court's precedents support similar treatment when interpreting § 924(c)(1). Cf. *Jones*, 526 U.S. at 235 (employing similar logic to classification of serious bodily injury).

The government suggests that, despite these observations, the traditional treatment of firearm type changed between 1988 and 1998, creating a different traditional backdrop for this Court's analysis of the statute as amended in 1998.[13] Gov. Br. 22-23. This argument relies on the treatment of firearm type in the United States Sentencing Guidelines. *Id.*

But the Guidelines are not a source on which this Court has relied to determine traditional treatment of a fact. Serious bodily injury—which this Court noted in *Jones* has traditionally been treated as an offense element, 526 U.S. at 234-37—is a sentence enhancer in the Guidelines as well. See, *e.g.*, U.S.S.G. §§ 2A3.1(b)(4), 2A4.1(b)(2), 2B3.1(b)(3), 5K2.2. The Guidelines permit a sentencing court to consider uncharged conduct, including entire offenses, in sentencing within the range authorized by the jury's verdict. See, *e.g.*, *id.* § 2K2.1(b)(5).

(prohibiting the knowing possession of a "machine gun, short-barreled rifle, short-barreled shotgun or firearms silencer"); Wash. Rev. Code Ann. § 9.41.190 (making it unlawful to "manufacture, own, buy, sell, loan, furnish, transport, or have in possession or under control, any machine gun, short-barreled shotgun or short-barreled rifle").

[13] The government does not suggest that trends in legislation and in the Guidelines in any way undermine this Court's observations in *Castillo* about the nature of firearm type in the context of "use and carry" provisions.

Those provisions were never meant to identify a dividing line between offense elements and sentencing factors. The government's use of the Guidelines as the source of a new "tradition" to supplant the past practice of treating firearm type as an element should be rejected.[11]

2. The Twenty-Five Year, Six-Fold Increase To The Mandatory Minimum Based On A Finding That The Firearm Is A Machinegun Is Not The Type Of Increase Usually Associated With Sentencing Factors.

In *Jones*, *Castillo*, and *Harris*, the impact of the fact at issue on sentencing was another critical factor that assisted this Court in distinguishing offense elements from sentencing factors. *Castillo*, 530 U.S. at 131; see also *Harris*, 536 U.S. at 554; *Jones*, 526 U.S. at 243-44. In each case, the Court gave careful consideration to the "length and severity" of the sentence. *E.g.*, *Castillo*, 530 U.S. at 131. The six-fold, twenty-five year increase triggered by a machinegun finding under the prior version of § 924(c), addressed in *Castillo*, was the most extreme increase of all those considered in these cases. See *id.* After the 1998 amendments, the same factual finding leads to the same increase, except that now the increase applies to a mandatory minimum sentence.

---

[11] *Harris* referred to the "brandishing" and "discharging" provisions of the Guidelines only to highlight the *absence* of a federal tradition of treating those characteristics as offense elements. *See, e.g.*, 536 U.S. at 555-54 ("[T]he Guidelines appear to have been the only antecedents for the statute's brandishing provision. The term 'brandished' does not appear in any [other] federal offense-defining provision.")

The *Harris* majority acknowledged that it might have questioned the inference arising from the statute's structure (that the clauses of § 924(c)(1)(A) identified sentencing factors) "if brandishing or discharging altered the defendant's punishment in a manner not usually associated with sentencing factors." 536 U.S. at 554. But the Court viewed the two-year increase for brandishing as insignificant—or no "higher penalt[y] at all"—based on its view that the seven-year sentence was an available sentencing option even without a finding of brandishing. *Id.*

The same cannot be said of the much steeper increase here. Under § 924(c), there is no Guidelines range; instead, the Guidelines prescribe a sentence fixed at the length of the mandatory minimum set forth in the statute. U.S.S.G. § 2K2.4. A sentencing court would be hard-pressed to justify an increase of twenty-five years either as an upward departure or as a variance in light of the constraints of 18 U.S.C. § 3553(a). See *Gall* v. *United States*, 552 U.S. 38, 50 (2007) ("We find it uncontroversial that a major departure [from the Guidelines range] should be supported by a more significant justification than a minor one.").

The government observes that two other federal statutes permit similarly severe levels of enhancement based upon purported sentencing considerations. Gov. Br. 26-28 (citing the federal kidnapping statute, 18 U.S.C. § 1201(a) (victim's minor status triggers a twenty-year mandatory minimum sentence), and the criminal enterprise statute, 21 U.S.C. § 848(b) (life sentence for principal status and annual gross receipts of $10 million or more)). These statutes, neither of which has been construed by this Court, do not negate the Court's reliance on the extent of a penalty increase as a

significant factor in determining whether a fact is an element or a sentencing consideration. See *Castillo*, 530 U.S. at 131.

In any event, both of these statutes appear to describe offense elements. As for the kidnapping statute, 18 U.S.C. § 1201(a), a victim's status is both "based on the nature of the offense," *Cunningham* v. *California*, 549 U.S. 270, 295 (2007) (Kennedy, J., dissenting), and a traditional element in other federal provisions, *e.g.*, 18 U.S.C. §§ 2241, 2421, 2423, 2251, 2252, as well as state statutes, *e.g.*, Mass. Gen. Laws ch. 265, § 26A (1933); Ohio Rev. Code Ann. § 2905.01(A)(4) (2009); R.I. Gen. Laws § 11-26-1.4 (1956); Utah Code Ann. § 76-5-301 (1953). The criminal enterprise statute, 21 U.S.C. § 848(b), likewise "inarguably . . . refers to behavior which the legislature intended to prohibit." *McMillan*, 477 U.S. at 95 (Stevens, J., dissenting). "As a consequence, the prohibited conduct had to be established by proof beyond a reasonable doubt." *Id.*

Unlike the brandishing or discharging provisions discussed in *Harris*, use of a machinegun alters the defendant's punishment significantly, in a way not usually associated with sentencing factors. See *Harris*, 536 U.S. at 554. It does not present the type of incremental penalty increases which *Harris* described as those one would expect to find in provisions aimed at identifying sentencing matters for a judge to consider. See *id.* In fact, the same extreme degree of increase exists in this case as existed in *Castillo*. See 530 U.S. at 131. This staggering increase counsels strongly against the single-crime interpretation.

3. The Legislative History Of The 1998 Amendments Supports Reading § 924(c)(1)(B) As Setting Forth Offense Elements.

This Court has recognized that, "[u]nder established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley*, 490 U.S. at 549 (quoting *Anderson*, 225 U.S. 187). There is no indication from the legislative history surrounding § 924(c) that Congress intended, in the 1998 amendments, to change the firearm-type provisions from offense elements into mere sentencing factors.

To the contrary, Congress's clear intent in promulgating the 1998 amendments was to reverse the impact of this Court's decision in *Bailey*, and to increase penalties for § 924(c) violators. The amending bill was known as the "*Bailey* Fix Act" in the Senate, and legislators in both houses noted that the legislation was in response to this Court's "invitation" in *Bailey* "to make clear that possession [of a firearm] alone does indeed trigger liability [under § 924(c)]." 143 Cong. Rec. S405 (1997) (Sen. Helms). The committee report noted that the bill "provides for an increased mandatory penalty for any person who possesses brandishes or discharges a firearm during and in relation to the commission of a federal crime of violence or drug trafficking crime." H.R. Rep. No. 105-311, at 2 (1997).[15] Nothing in the

---

[15] *See also* 144 Cong. Rec. H10330-01 (1998) (Rep. Myrick) ("In the 1995 case of *Bailey* v. *United States* . . . the Supreme Court interpreted the word 'carry' in the Federal criminal code to mean that a felon must fire or brandish his weapon. This is

congressional records suggests any intent to change firearm type from an element of an offense to a sentencing factor.

Lower courts have interpreted the changes in structure incorporated in the 1998 amendments in a similar fashion. The division of the statute into subprovisions was not, these courts have recognized, intended to alter the meaning or effect of the statutory language but were necessary to accommodate the addition of the "brandishing" and "discharging" provisions as sentencing factors. *E.g.*, *United States* v. *Alaniz*, 235 F.3d 386, 388 (8th Cir. 2000) ("Because of this increase in sentencing possibilities, Congress divided what was already a lengthy subsection into distinct subdivisions."); see also *United States* v. *Studifin*, 240 F.3d 415 (4th Cir. 2001) (same). The lower courts also agree that the central purpose behind the 1998 amendments was to broaden the reach of the statute in the wake of this Court's decision in *Bailey*. See, *e.g.*, *Alaniz*, 235 F.3d at 386-89; *Studifin*, 240 F.3d at 420.

---

clearly contrary to Congress's intent, and it has resulted in the early release of hundreds of dangerous criminals. To put a stop to this mess, S. 191 clarifies that a criminal who possesses a gun while committing a violent crime or a drug crime will face a mandatory sentence. And at the same time, the bill increases the mandatory sentence for such crimes."); 144 Cong. Rec. H10330-01 (1998) (Rep. McCollum) ("This legislation clarifies Congress' intent as to the type of criminal conduct which should trigger the statute's application. The bill strikes the now unworkable use or carry element of the statute and replaces it with a *structure which allows the penalty enhancement for possessing, brandishing, or discharging* a firearm during and in relation to a Federal Crime of violence or drug trafficking crime") (emphasis added); 144 Cong. Rec. S12670 (1998) (Sen. DeWine) ("This legislation will provide enhanced mandatory minimum penalties for those criminals who use guns while trafficking in drugs or in commission of violent crimes.").

This Court recognized in *Castillo* that the pre-1998 legislative history of § 924(c) suggests that "Congress believed that the 'machinegun' and 'firearm' provisions would work similarly"—as separate offenses. 530 U.S. at 130. This history is not superseded by anything in the record of the 1998 amendments and therefore supports the conclusion that firearm type was intended to remain an element of a separate offense.

* * *

Mr. Burgess submits that § 924(c)(1)(B)(ii) contains elements of an aggravated offense. Even if the foregoing analysis leaves uncertainty as to the meaning of § 924(c)(1)(B)(ii), ambiguous criminal statutes are to be construed in favor of the accused. *Castillo*, 530 U.S. at 131; see also *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality); *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917). That is particularly true where, as here, a twenty-five year increase to a mandatory minimum sentence is involved, see *Dean*, 129 S. Ct. at 1860 (Breyer, J., dissenting), and where the government's competing construction cannot be squared with constitutional limitations.

II. THE GOVERNMENT'S INTERPRETATION OF § 924(C)(1)(B) IS INCONSISTENT WITH CONSTITUTIONAL REQUIREMENTS.

Any remaining doubt over the meaning of § 924(c) must, in any event, be resolved against the government. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," the Court's duty is to adopt the latter. *Jones*, 526 U.S. at 239 (quoting

United States v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

By urging the Court to adopt an interpretation of § 924(c)(1)(B) that would abrogate much of this Court's reasoning in *Castillo*, the government raises a series of grave and doubtful constitutional questions that were avoided by the statutory ruling in that case. The government's brief nowhere addresses these questions, which are so often a feature of this Court's analysis in similar cases. And, as the government construes the statute, it would be clearly unconstitutional. It would relabel elements as sentencing factors, evading indictment, jury, and proof requirements contrary to prior opinions of this Court.

The government makes the stunning suggestion that the Court should respect what it characterizes as Congress's choice to treat use of a machinegun as a sentencing factor, because doing so would "simplif[y] and streamline[] guilt-stage proceedings without interfering with the accuracy of fact-finding." Gov. Br. 33. This desire on the part of prosecutors to clear the path to guilt and to higher sentences with as little an evidentiary burden as possible is one of the dangers against which the Constitution protects. The Court's "decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely* v. *Washington*, 542 U.S. 296, 313 (2004); see also *Jones*, 526 U.S. at 246 ("[L]et it be again remembered, that . . . little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.") (quoting Blackstone). Instead, "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at

313 (emphasis in original). The Court should reject the government's construction and thereby avoid the constitutional questions that necessarily arise.[16]

A. Constitutional Limitations Prevent Congress From Relabeling Elements As Sentencing Factors.

Congress cannot relabel "the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney* v. *Wilbur*, 421 U.S. 684, 698 (1975); *In re Winship*, 397 U.S. 358 (1970). Otherwise, Congress would have unbridled power to deprive defendants of their Fifth and Sixth Amendment rights by redefining crimes, allowing judges to find the facts that constitute the offense by a preponderance of the evidence. *McMillan*, 477 U.S. at 86; *Jones*, 526 U.S. at 242; see also *Harris*, 536 U.S. at 550. "Once a [legislature] defines a criminal offense, the due process clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt." *McMillan*, 477 U.S. at 96 (Stevens, J., dissenting).

1. Firearm type has been an element of a § 924(c) offense from the time it was introduced into the statute, and it is by nature a component of the prohibited transaction, "lying closest to the heart of the crime at issue." *Castillo*, 530 U.S. at 126-27.

---

[16] *See also Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001) ("[I]t is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

"The difference between carrying, say, a pistol and carrying a machinegun . . . is great, both in degree and kind." *Id.* at 126. Thus, a finding that the firearm possessed was a machinegun (or other form of specialized weapon or destructive device) results in a special stigma: the government, for example, characterizes such weapons as "some of the most dangerous and threatening weapons available." Gov. Br. 31. It also results in a special punishment: in the words of the government, "the difference between sentencing a defendant under the machinegun enhancement of § 924(c), or merely under the brandishing enhancement of the statute, is 23 years of mandatory incarceration." J.A. 52. That difference is comparable to the one in *Mullaney*—twenty years for manslaughter and life for murder—which was held to prohibit reclassification of the element as a mere sentencing factor. See 421 U.S. at 698.

The issue here, then, is not purely one of statutory construction. Even if in 1998 Congress had somehow intended to do what the government claims was accomplished—the relabeling of what was formally (and traditionally) an element of the offense into a separate fact for the sentencing court to find—the Court's precedents nonetheless require consideration of whether the practical effect of having done so is consonant with the requirements of the Fifth and Sixth Amendments. *E.g., id.* "[T]he substantiality of the jury claim is evident from the practical implications of assuming Sixth Amendment indifference to treating a fact that sets the sentencing range as a sentencing factor, not an element." *Jones*, 526 U.S. at 243 (footnote omitted).

2. Here, the practical implication of constitutional indifference is untenable. Prosecutors openly conceded that they had to dismiss Count IV because

they could not prove beyond a reasonable doubt that Mr. Burgess or Mr. O'Brien knew that the Cobray was a machine gun. J.A. 51-52. And, in pleading guilty, neither made such an admission. *Id.* at 43. At sentencing, prosecutors recommended a twelve-year sentence for both Mr. Burgess and Mr. O'Brien—even though they would later seek a thirty-year sentence on appeal, where they would use their admitted lack of evidence on *mens rea* to support an argument rather than let it be the reason why they would have lost in the trial court. See *supra* note 4. No more patent demonstration of the practical implications of constitutional indifference can be imagined.

These constitutional concerns do not disappear simply because the twenty-five-year sentence increase is now to a mandatory minimum rather than a fixed sentence. In *McMillan*, this Court acknowledged that Congress cannot circumvent constitutional guarantees of due process, notice, and jury trial by relabeling long-recognized offense elements as sentencing factors. 477 U.S. at 88. One critical question for the Court was whether the judicially determined sentencing factor gave the "impression of having been tailored to permit [it] to be a tail which wags the dog of the substantive offense." *Id.* Here, § 924(c)(1)(B)(ii), if read as a sentencing factor alone, gives precisely that impression. The five-year term of imprisonment resulting from a jury verdict on § 924(c)(1)(A) is dwarfed by the six-fold increase based on a judicial finding that the firearm was a machinegun. See *Castillo*, 530 U.S. at 123-31. Further, the factual question without which 84 percent of the sentence could not be imposed would be answered by a judge on only a preponderance of the evidence. According to the government, there would be no consideration of

whether the defendant knew the nature of the firearm. The jury's role would be reduced to that of a gatekeeper, reaching only a general verdict that then enables the judge to make the finding on firearm type that would, in a much more practical sense, determine the defendant's fate. See *id.* Firearm type thus becomes the tail that wags the dog of the § 924(c) offense.

3. Resort to *McMillan* and the rhetoric of mandatory minimum sentencing simply cannot support the government's reading of § 924(c)(1)(B)(ii). In *McMillan*, the Court rejected a due process challenge to the Pennsylvania Mandatory Minimum Sentencing Act. 477 U.S. at 84-91. The Act set a five-year mandatory minimum sentence for certain enumerated felonies (*e.g.*, murder, robbery, kidnapping, rape) where the defendant visibly possessed a firearm. *Id.* at 83. It did not provide for the imposition of a sentence separate from that imposed for the underlying felony, nor did it remove elements from any of the enumerated offenses. *Id.* Rather, it set a mandatory minimum sentence for those offenses, "which may be more or less than the minimum sentence that might otherwise have been imposed." *Id.* The Court acknowledged that it had not precisely defined the constitutional limits on the power of states to reallocate burdens of proof in criminal cases. *Id.* at 84-91. Without purporting to do so in *McMillan*, the Court held that the Pennsylvania statute did not violate due process. *Id.* That statute, according to the Court, "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given to that factor." *Id.* at 89-90.

The constitutional limitations that were recognized

but not defined in *McMillan* apply here and prohibit the government from obtaining dramatically increased sentences without application of these constitutional principles.

4. The driving force behind the government's argument is its desire to "streamline guilt-stage proceedings" and to avoid the necessity of proving to a jury that a defendant knew the firearm was a machinegun. Gov. Br. 33. But these administrative concerns, as noted earlier, are simply no justification for infringing upon the individual rights of defendant.

In any event, the government offers no evidentiary support for its claims of difficulties in obtaining convictions, and none is apparent in the available data. To the contrary, as summarized in Mr. Burgess's brief in opposition, the data disclose no apparent disparity in sentencing that might correspond to the circuit courts' rulings on whether firearm type is an element. See Burgess BIO apps. A, B.

In addition, the claimed problem of proof would pertain to only a very few factual scenarios that arise under § 924(c)(1)(B)(ii). If the firearm is a destructive device, such as a bomb, it is hard to imagine prosecutors having great difficulty proving a defendant's knowledge. Further, if it is a firearm that was manufactured to function in automatic mode, *mens rea* again should present little or no unusual difficulty. Only in cases like this one, where the firearm was not manufactured to function as a machinegun and its ability to do so is not obvious *might* proof of knowledge present a challenge. But this Court should not look to eliminate that challenge at the expense of due process, notice, and jury trial rights, particularly where the consequence to defendants is so staggering.

B. This Court's Decision In *Harris* Is Not To The Contrary.

In *Harris*, a divided Court affirmed imposition of a seven-year mandatory minimum sentence for brandishing a firearm under § 924(c)(1)(A)(ii). 536 U.S. at 568. *Harris* cannot save the government's interpretation of § 924(c)(1)(B) because its conclusion was largely driven by features of the brandishing provision that are not present in the firearm-type provisions.

The Court in *Harris* viewed the seven-year mandatory minimum for brandishing as a sentencing option that was available even without a finding of brandishing. *Id.* at 561. But the thirty-year sentence called for in § 924(c)(1)(B)(ii) could *not* be imposed based solely on the facts to which the respondents pled guilty. A sentence of that length without the machinegun finding would be an unreasonable departure from the Guidelines, which call for a seven-year sentence. See U.S.S.G. § 2K2.4(b) ("the guideline sentence is the minimum term of imprisonment required by statute"). Because upward departures are rare in § 924(c) sentencing, an increase this dramatic would require a compelling justification. See *Gall*, 552 U.S. at 50.

C. To The Extent *McMillan* and *Harris* Would Permit The Government's Interpretation, They Should Be Overturned.

In *Jones* and *Apprendi*, the Court articulated the important Fifth and Sixth Amendment principles that the government says do not apply here because the increase in the sentence affects "only" a mandatory minimum. Gov. Br. 24. If the government can use *McMillan* and *Harris* as a shield

against constitutional protections, then the Fifth and Sixth Amendment principles articulated in *Apprendi* will operate only when the government so desires.

1. Any criminal statute could be amended to substitute mandatory minimums for fixed sentences, inserting life imprisonment as the maximum sentence or failing to provide any maximum sentence at all. By this reasoning, Congress could *Mullaney*- and *Apprendi*-proof any or all criminal statutes by insuring that no element recast as a sentencing factor—indeed, nothing at all—would increase the statutory maximum.

This obviously reflects an overly expansive reading of *McMillan* and *Harris*. In neither of these cases did the Court establish a categorical rule that exempted mandatory minimum sentences from constitutional scrutiny. *McMillan* expressly declined to delineate the limitations on the power of states to redefine criminal offenses. 477 U.S. at 84-91. And the *Harris* plurality suggested that its own conclusion might be questioned when a statute increased the mandatory minimum (but not the maximum) *based on a factor traditionally treated as an element*. 536 U.S. at 560.

Section 924(c)(1)(B) itself provides compelling reasons for distinguishing *McMillan* and *Harris*. *First*, firearm type was previously treated as an element in this very statute, consistent with this Court's observation of its traditional treatment. See *Castillo*, 530 U.S. at 123-31. *Second*, the increase in sentence based on a machinegun finding is categorically different than those considered in *McMillan* or *Harris*. It not only exceeds the sentence authorized by the jury verdict; it completely overshadows it. Cf. *id.*

2. *Harris* carries little, if any, precedential weight on this issue. Only four Justices joined the opinion's constitutional discussion. 536 U.S. at 556-68. The remaining five—four in dissent, and one concurring in the judgment (based on disagreement with *Apprendi* itself)—concluded that the plurality's conclusion was inconsistent with *Apprendi*. See *id.* at 569-72 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 572-83 (Thomas, J., dissenting). The plurality opinion thus cannot be viewed as binding. *CTS Corp.* v. *Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987).

The *Harris* plurality opinion need not and should not be followed. As Justice Thomas explained:

> It is true that *Apprendi* concerned a fact that increased the penalty for a crime beyond the prescribed statutory maximum, but the principles upon which it relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum: When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is "by definition [an] 'elemen[t]' of a separate legal offense." Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.

536 U.S. at 579 (Thomas, J., dissenting); see also *id.* at 577-78 ("As a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards.").

This same concern with the range of penalties to which a defendant may be exposed drove the Court's earlier decisions. For example, in *Jones*, the Court repeatedly referred to sentencing "ranges" rather than statutory maxima alone. *E.g.*, 526 U.S. at 233, 244, 248; see also *id.* at 252 (Stevens, J., concurring) (same); *id.* at 253 (Scalia, J., concurring) (same).

The *Harris* dissent correctly recognized this incongruity between the precedents set by *Jones* and *Apprendi* on the one hand, and *McMillan* on the other. 536 U.S. at 577-79 (Thomas, J., dissenting). That dissent is more in line with the conflicted nature of the cases holding precedential authority, while the *Harris* plurality resolves that conflict only by bracketing the precedent.

3. This Court need not disturb the holdings of either *McMillan* or *Harris* to conclude that the firearm-type provision of § 924(c)(1)(B) contains offense elements. See *supra* Part II.B. It need not do so even to conclude that the government's reading of § 924(c)(1)(B) violates the Fifth and Sixth Amendment rights of the respondents in this particular case. See *infra* Part II.D. But, if this Court interprets these cases as establishing a rule that *any* increase to a mandatory minimum sentence based on a judge-found facts—no matter how great and even if based on a fact that was formerly and traditionally an offense element—is not a "higher penalt[y] at all," *Harris*, 536 U.S. at 554, and thus constitutionally permissible, then those cases must be overturned.

D. Reading § 924(c)(1)(B) To Contain Sentencing Factors Would Violate The Respondents' Fifth And Sixth Amendment Rights In This Case.

The government's interpretation of § 924(c)(1)(B)(ii) raises other serious constitutional concerns that are rooted in the jurisprudence of sentencing after *United States* v. *Booker*, 543 U.S. 220 (2005).

1. After *Booker*, this Court clarified the parameters of substantive reasonableness review. In *Rita* v. *United States*, 551 U.S. 338 (2007), the Court held that properly calculated within-Guidelines sentences enjoyed a presumption of reasonableness. *Id.* at 347. The same year, in *Gall*, the Court explained that, in imposing sentences outside the Guidelines range, "a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or unusually harsh sentence is appropriate in a particular case with sufficient justifications." 552 U.S. at 46. The sentencing court must "ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* at 50. Rejecting a presumption that sentences outside the Guidelines range are *un*reasonable, *Gall* held that "appellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines" in reviewing the reasonableness of a sentence. *Id.* at 47.[17]

Reasonableness review has constitutional implications. As Justice Scalia noted in *Rita*,

---

[17] Notably, however, the facts supporting the petitioner's sentence in *Gall* had been admitted. 552 U.S. at 64 (Alito, J., dissenting); so the Court had no call to address the Sixth Amendment implications of its ruling.

"[u]nder such a system, for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant." 551 U.S. at 372 (Scalia, J., dissenting). "*Every* sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment." *Id.* at 372.

2. These principles, as applied in this case, highlight the difficulty that would arise if § 924(c)(1)(B)(ii) were held to describe a sentencing factor. Mr. Burgess admitted to brandishing a "firearm" during a crime of violence; they did not admit to using a machinegun, or any enhancing fact. That observation has held true with respect to § 924(c) sentences since *Harris*. See U.S. Sent'g Comm'n, *Monitoring of Criminal Sentences, 2008* (2009). Even where sentencing courts have imposed enhanced sentences in cases involving § 924(c) charges, those sentences (like the one imposed here) are comparatively modest, and even the highest such sentence in a combined sentence for the underlying offense and the § 924(c) offense has been only 177 months (just under fifteen years)—or less than half of the thirty-year mandatory minimum that the government seeks to invoke here. *Id.*

Yet, if firearm type in § 924(c)(1)(B) is read as a sentencing factor, which can be found by the judge based on a preponderance of evidence, then (assuming the government could offer such proof) the sentencing judge would be *required* to impose a sentence more than four times greater than that recommended by the Guidelines. See 18 U.S.C. § 924(c)(1)(B)(ii). It is difficult, if not impossible, to imagine how such a sentence could be justified as "reasonable" based solely on the facts admitted by

Mr. Burgess in his plea, as would be required under the Fifth and Sixth Amendments. See *Gall*, 552 U.S. at 50. To the contrary, a thirty-year sentence imposed upon Mr. Burgess in this case would almost certainly be not only unreasonable, but unconstitutional. See *id.*; see also *Rita*, 551 U.S. at 372 (Scalia, J., concurring in part and concurring in the result) (a sentence of seven times the Guidelines range would be unreasonable absent reliance on additional judge-found facts).

The government dismisses this constitutional problem in one sentence: "Congress has already specified the sentence, and it is not subject to appellate review under *Booker* for reasonableness." Pet. Reply 9. This misses the point. In the absence of this statutory provision, a thirty-year sentence for Mr. Burgess based on the plea-admitted facts would not be substantively reasonable. See *Harris*, 536 U.S. at 557; cf. *Cunningham*, 549 U.S. at 270. "[T]he relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Blakely*, 542 U.S. at 303-304. Here, the plea did not authorize the imposition of a thirty-year sentence.

Thus, interpreted as a sentencing factor, the thirty year mandatory minimum sentence set forth in § 924(c)(1)(B)(ii), if imposed in this case, would be unconstitutional.

3. Treating § 924(c)(1)(B) as a sentencing fact to be found by the judge rather than a separate element to be found by the jury would violate the Fifth and Sixth Amendments as applied in this case. Where, as here, facts are essential to the reasonableness of a defendant's sentence, the Constitution dictates that

those facts must be found by a jury beyond a reasonable doubt.

CONCLUSION

For these reasons, the Court should affirm the decision of the Court of Appeals for the First Circuit.

Respectfully submitted,

JEFFREY T. GREEN
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LESLIE FELDMAN-RUMPLER
Counsel of Record
101 Tremont Street
Suite 708
Boston, MA 02108
(617) 728-9944

TACY F. FLINT
JEREMY G. MALLORY
SEAN A. SIEKKINEN
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

JUDITH H. MIZNER
ASSISTANT FEDERAL
PUBLIC DEFENDER
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
DISTRICT OF MASSACHUSETTS
51 Sleeper Street, 5th Floor
Boston, MA 02210
(617) 223-8061

Counsel for Respondent Arthur Burgess

January 14, 2010

APPENDIX

1. 18 U.S.C. § 924(c) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

2. 18 U.S.C. § 924(c) (1988 ed.) provided:

Penalties

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under

the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

OPPOSITION BRIEF

No. 08-1569

IN THE SUPREME COURT OF THE UNTIED STATES

UNITED STATES OF AMERICA,
PETITIONER

V.

MARTIN O'BRIEN AND ARTHUR BURGESS
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

OPPOSITION OF RESPONDENT MARTIN O'BRIEN TO THE PETITION FOR A WRIT OF CERTIORARI

Timothy P. O'Connell
Counsel of Record
C-8 Shipway Place
Charlestown, MA 02129
(617) 242-4806

August 24, 2009

QUESTION PRESENTED

Whether Petitioner fails to present an issue, that the language in 18 U.S.C. §924(c) as amended in 1998 is sufficient to remove a firearm type provision from being an element of a crime that must be charged in an indictment and either admitted by the defendant or proved to a jury beyond a reasonable doubt, and make it a sentencing factor that may be found by a judge by the preponderance of the evidence, precluding the rights of the respondent under the Fifth and Sixth amendments to the Constitution of the United States.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PROCEDURAL HISTORY 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING CERTIORARI 5

THE DISTRICT COURT AND COURT OF APPEAL'S DECISION IS CORRECT 7

THE TEXT AND STRUCTURE OF 18 U.S.C. §924(C)(1)(B) IS SIMILAR TO 18 U.S.C. §2119(1)(2)(3) 8

THIS CASE DOES NOT CONFLICT WITH *CASTILLO* 13

THERE IS NO CIRCUIT SPLIT CONCERNING THE RESPONDENT'S FIFTH AND SIXTH AMENDMENT RIGHTS 18

THE COBRAY CM-11 Ser. #94-00114612 IS IN CONTROVERSY THAT IT IS A MACHINEGUN 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 U.S. 466 (2000) 6

Bailey v. United States,
516 U.S. 137 (1995) 15,16

Blakely v. Washington,
542 U.S. 296 (2004) 6,7

Castillo v. United States,

530 U.S. 120 (2000) ..... passim

Cunningham v. California,
549 U.S. 270 (2007) 6,7

Harris v. United States,
536 U.S. 545 (2002) 7.13

Jones v. United States,
526 U.S. 227 (1999) 5,9

McMillan v. Pennsylvania,
477 U.S. 79 (1986) 15.16

Ring v. Arizona,
536 U.S. 584 (2002) 6

Smith v. United States,
508 U.S.
223(1993)..... 14

United States v. Alerta,
96 F.3d 1230
(9th Cir.1996)..... 10,1
4

United States v. Avery,
295 F.3d 1158
(10th Cir. 2002)..... 21

United States v. Booker
543 U.S. 220 (2005) 7

United States v. Carll,
105 U.S. 611
(1881)..... 10

United States v. Cassell,
530 F.3d 1009
(D.C. Cir. 2008)
cert. denied, 129 S.Ct. 1038 (2009)..... 18,19

United States v. Ciszkowski
492 F.3d 1264

(11th Cir 2007)
..... 20,21

United States v. Gamboa,
439 F.3d 796
(8th Cir.),
cert. denied.
549 U.S. 1042 (2006) 8. 20

United States v. Harris,
397 F.3d 404
(6th Cir. 2005)..... 6

United States v. Harrison
272 F.3d 220
(4th Cir. 2001)
..... 19,20

United States v. Hess
124 U.S. 483
(1888)..... 10,11
United States v. Melvin,
27 F.3d 710
(1st Cir. 1994)..... 14

United States v. Moore.
958 F.2nd 310
(10TH Cir.1995) 14

United States v. Sandoval.
241 F.3d 549
(7th Cir. 2001) 3,4.20

United States v. Sims,
975 F.2d 1225
(6th Cir. 1992) 14.15

Federal Statutes

18 U.S.C. §924(c)(1) ..... passim

18 U.S.C. §924(c)(1) (1988 ed., Supp. V) ..... passim

18 U.S.C. §924(c)(1)(A) 13

18 U.S.C. §924(c)(1)(A)(ii) 13

18 U.S.C. §924(c)(1)(B) ..... passim

18 U.S.C. §924(c)(1)(B)(i) ..... passim

18 U.S.C. §924(c)(1)(B)(ii) ..... passim

18 U.S.C. §1951 1,2

18 U.S.C. §2119 5,9,12

Other Authorities

United States Constitution, amendment five ..... passim

United States Constitution, amendment six ..... passim

42 Pa.Const.Stat. 9712(a) 16

42 Pa.Const.Stat. 9712(b) 16

Pub. L. 105-386, §1(a)(1), 112 Stat. 3469 17

Pub. L. 107-273, 116 Stat. 1809, 1821 18

Pub. L. 109-92, 119 Stat. 2100, 2102 18

Pub. L. 109-304, 120 Stat. 1707 18

Senate Bill S. 653 (1993) 17

House Bill H.R. 3184 17

IN THE SUPREME COURT OF THE UNTIED STATES

No. 08-1569

UNITED STATES OF AMERICA, PETITIONER

V.

MARTIN O'BRIEN AND ARTHUR BURGESS, RESPONDENTS

OPPOSITION OF RESPONDENT MARTIN O'BRIEN TO THE PETITION FOR A WRIT OF CERTIORARI

PROCEDURAL HISTORY

On September 23, 2008, the judgment of the First Circuit Court of Appeals was entered upholding the ruling in the United States District Court for the District of Massachusetts that the Firearm Type Provision, contained in 18 U.S.C. §§924(c)(1)(B)(ii), relating to a machinegun, was an element of a separate offense and had to be either admitted to by the defendant or proved to a jury beyond a reasonable doubt. A petition for rehearing en banc was denied on January 26, 2009.

STATEMENT OF CASE

The respondent was charged in a superceding indictment with Counts I and II charging Hobbs Act violations for attempted robbery and conspiracy to affect interstate commerce, 18 U.S.C. §1951. Count III charged that the defendants possessed and used a Cobray CM11 pistol with a serial number of #94-0014612 in violation of 18 U.S.C. §924(c)(1) while committing a violation of 18 U.S.C §1951 (Hobbs Act). Count IV charged that the defendants possessed and used a Cobray CM11 machinegun with a serial number of #94-0014612 in violation of 18 U.S.C. §924(c)(1) while committing a violation of 18 U.S.C §1951

(Hobbs Act). The government moved to dismiss Count IV, and the motion was allowed. The respondent entered guilty pleas to Counts I, II, and III.

The government knew the Cobray CM11 pistol (serial number #94-0014612) was manufactured and sold as a Semi-Automatic weapon and had previously provided records to the defendant during the discovery process that supported that fact. The FBI Examiner's report did not state that the Cobray CM11(serial number #94-0014612) weapon was ever modified by anyone to operate as a machine gun.[1]

Some five months after the confiscation of the weapon, after the FBI test fired the Cobray, did the Examiner state in his report that the weapon fired in the automatic mode.[2]

---

[1] In this case, an agent of the ATF, opined that the MAC-11 that the respondent was charged with came under 18 U.S.C. §§ 921(a)(3) describing a firearm pursuant to § 924(c)(1). He did not describe the firearm as a machinegun pursuant to §§ 921(a)(23) §§ 921(a)(30) (Assault Weapons) was repealed when the Sunset provision took effect on September 13, 2004.

[2] There is no automatic mode on the Cobray. The only two modes on the weapon are fire and safe and on the housing/receiver it states, "SEMI".

Respondent refers to the First Circuit of Appeal's description of the relevant facts as well as the Plea Hearing when the Honorable Mark L. Wolf analyzed the differences in cases regarding the 1998 version of 18 U.S.C §§924(c)(1)(B)(ii) and the §924(c)(1)(a) (1988 Ed. Supp. V). The above were exhibited in the Petition for Certiorari in Appendix "A" and "C" respectively.[3]

At the plea hearing Judge Wolf decided that proving a machinegun, as required by the statutory provision, is an element of the offense, not a sentencing factor. Judge Wolf agreed with the Sixth Circuit in *U.S. v. Harris*, 397 F.3rd 404 and disagreed with the reasoning of the Seventh Circuit in Sandoval, 241 F.3rd 549. The Seventh Circuit found that the semiautomatic assault weapon pursuant to 18 U.S.C. §§924(c)(1)(B)(i) was a sentencing factor. (Pet. App. C. at p. 15a). While on the other hand Harris held, "...§924 Firearm-Type Provision mandatory minimum is not binding on a sentencing court unless the type of firearm involved is charged in the indictment and proved to a jury beyond a reasonable doubt." *Harris* at 406

Judge Wolf concluded that proving a machine gun was an element of the offense was consistent with this Court's decision in *Castillo*, 530 U.S. 126. In *Castillo*, although an early version of 18 U.S.C. §924(c)(1)(a) (1988 Ed. Supp. V) was decided after Congress enacted the 1998 version. Judge Wolf stated that the Court in *Castillo* explained the considerations for analysis in deciding whether a machinegun is an element of the offense or a sentencing factor and that the

---

[3] Respondent will reference Petitioner's Appendix as Pet. App. at p.__

Sixth Circuit in *Harris* also considered all the factors discussed in *Castillo* where the Seventh Circuit in *Sandoval* did not. (Pet. App. C. at p. 16a).

The Supreme Court stated in *Castillo*, 530 U.S. 126, that the nature of the weapon, including the distinction between a pistol and a machinegun, is usually a substantive matter and the nature of the weapon is therefore traditionally an element of the offense. (Pet. App. C. at p. 16a).

Judge Wolf stated that the structure of the statute favored the conclusion that a machinegun is an element and not a sentencing factor. Beside the above Judge Wolf's reasoning was that Congress would have listed a machinegun under 18 U.S.C. §§924(c)(1)(A) with traditional sentencing factors. Judge Wolf stated that by not listing a machinegun with the traditional sentencing factors and inserting a new subsection "manifests an understanding of the traditional distinction between the way a weapon is used and the nature of the weapon itself.". (Pet. App. C. at p. 17a).

Just prior to Judge Wolf's conclusion that a machine gun is an element of the offense, he stated that the rule of lenity reinforces that, the length and severity of the added mandatory sentence, 30 years if it's a machinegun as opposed to five years, weighs in favor of finding that a machinegun is an element of the offense quoting from *Castillo* at 131. (Pet. App. C. at p. 17a).

The First Circuit's decision from which a request for a en banc hearing was denied stated: "We recognize that six circuits have reached a different outcome and concede that, if we were writing on a clean slate, the statute's language would be a powerful argument for the government's result. The problem is that prior statutory

language also favored the government. Yet a unanimous Supreme Court found persuasive contrary arguments of policy and tradition, which have not in the least been altered by the statute's revision.". (Pet. App. A. at p. 10a).

REASONS FOR DENYING CERTIORARI

The respondent, Martin O'Brien, respectfully requests that this Court deny the Solicitor General's petition for a writ of certiorari. The respondent states that the judgment of the United States Court of Appeals of the First Circuit is correct.

Although, the petitioner believes that the issue in this case relating to 18 U.S.C. §924(c)(1)(B) may not have been resolved, the same issue in another similar statute has been resolved. This Court decided in *Jones v. United States*, 526 U.S. 227, (1999), that the language in the structured subsections (2) and (3) of 18 U.S.C. 2119 (Carjacking Statute), created separate offenses from the main paragraph. See *Jones* at 251-252.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the court held, what *Jones* noted in 1999, "under the Sixth Amendment, any act (other than a prior conviction) that exposes a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Apprendi* at 490. See also *Cunningham v. California*, 549 U.S. 270 (2007).

In *Ring v. Arizona*, 536 U.S. 584, Justice Ginsburg stated, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt... A defendant may not be 'expose[d]...to penalty *exceeding* the

maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring* at 602.

Justice Scalia and Thomas concurred with Justice Ginsburg facts by stating. "I believe the fundamental meaning of the jury trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives-whether the statute calls them elements of the offense, sentencing factors, or Mary Jane-must be found by the jury beyond a reasonable doubt." *Ring* at 610.

Further, in *Blakely v. Washington* 542 U.S. 296 (2004), Justice Scalia expounded on the above and distinguished with clarity as to the holding in *Apprendi* stating, "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.". *Blakely* at 303.

In *United States v. Booker*, 543 U.S. 220 (2005), the Court affirmed its holding in *Apprendi* stating, "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved beyond a reasonable doubt." *Booker* at 244.

Moreover, In *Cunningham v. California* , 549 U.S. 270, (2007), this Court stated. "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge *and established beyond a reasonable doubt, not merely by a preponderance of the evidence*." *Cunningham* at 863.

THE DISTRICT COURT AND COURT OF APPEAL'S

DECISION IS CORRECT

The petitioner argues review is warranted because the First Circuit's "ruling is contrary to the statute's text and structure and conflicts with this Court's reasoning in *Castillo v. United States*, 530 U.S. 120 (2000) and *Harris v. United States* 536 U.S. 545 (2002)." In addition, the First Circuit ruling "widens and entrenches an existing circuit split."[4] Pet. Brief at 10. The respondent will address each of the petitioner's arguments.

I. THE TEXT AND STRUCTURE OF 18 U.S.C. §§924(C)(1)(B) IS SIMILAR TO 18 U.S.C. §§2119(1)(2)(3)

The Respondent disagrees with the Petitioner's assertion that the First Circuit's ruling is contrary to the statute's text and structure. The petitioner asserted "...courts have generally applied the analysis in this Court's opinion in *Harris*, which interpreted the new version of §924(c)(1)(A) to provide that whether the firearm is 'brandished'..., is a sentencing factor not an offense element.... The courts of appeals have reasoned that this Court's analysis in Harris of the structural and textual aspects of §924(c)(1)(A) 'applies with equal force to the factors listed in [Section] 924(c)(1)(B).' *Gamboa* 439 F.3d at 811." Pet. Brief at 11-12.

---

[4] The respondent does not agree for Fifth and Sixth Amendment purpose that the circuits are split

However, this Court in 1999 determined the text and structure of another statute, which is identically[1] broken up into subsection as the 1998 version of §§924(c)(1)(A) and (B). In that case this Court held, in a well reasoned decision, the language of serious bodily injury and death in the subsections of 18 U.S.C. 2119 were elements of the principle paragraph. Therefore, they were separate offenses and had to be either admitted by the defendant or proven to a jury beyond a reasonable doubt. *See Jones v. United States*, 526 U.S. 227, (1999).

The issue in *Jones* presented by Mr. Denvir to this Court was: "...whether in selecting certain factors to increase the sentence from carjacking from 15 years to a maximum to 25 to life, Congress intended those factors be considered only at the time of sentencing under a reduced standard of proof, or did they...Congress intend that they be elements of an offense which would have to be pled and **prove** beyond a reasonable doubt to a jury.". See *Jones v. United States* - Oral Argument at http:www.oyez.org.

This Court's holding in *Jones* avoided serious constitutional issues of the Fifth and Six Amendments. *Jones* held "...the Government's view would raise serious constitution questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions ...This is done by construing §2119 as establishing three separate offenses by the specification of distinct elements, each of which must be charged by the

[1] The only difference in 18 U.S.C. 2119 and 924(c)(1)(A)&(B) is that its subsections are identified differently. 2119 have numbered subsections (1), (2) and (3) while 924(c)(1)(A)&(B) have (i)(ii)(iii)

indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Jones* at 251-252.

The respondent states the question in this case is the same as in *Jones* concerning the structure of the statute.

Shortly after the *Jones* decision, this Court incorporated its analysis of *Jones* concerning the difference as to a sentencing factor and an element in *Castillo v. United States*, 530 U.S. 120, (2000)

The question for the Court in *Castillo* was, "...whether Congress intended the statutory references to particular firearm types in §924(c)(1)(1988 Ed. Supp. V)to define a separate crime or simply to authorize an enhanced penalty. If the former, the indictment must identify the firearm type and a jury must find that element proved beyond a reason doubt. If the latter, the matter need not be tried before a jury but may be left for sentencing judge to decide." *Castillo* at 123-124.

It was well established in *Castillo* that carrying a machinegun was both substantive and substantial. "Appeals have interpreted §924(c)(1) as setting forth a separate 'machinegun' element in relevant cases. See *Alerta* 96 F.3d, at 1235. ...other citations omitted...points to the conclusion that the difference between the act of using or carrying a 'firearm' and the act of using and carrying a 'machinegun' is both substantive and substantial a conclusion that supports a 'separate crime' interpretation." *Castillo* at 127.

This argument is not a novel approach. See *United States v. Carll*, 105 U.S. 611 (1881) and *United States v. Hess*, 124 U.S. 483 (1888)

In *Carll* and *Hess* the government omitted substantive information in the charges against the defendants. This Court held it was wrong to omit the substantive information.

In *Hess* the Court stated, "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but must state the species: it must descend to particulars...The object of the indictment is, first, to furnish the accused with such a description of the charges against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause: and , second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent: and these must be set forth in the indictment with reasonable particularity of time, place and circumstances." *Hess* at 487-488.

In the above case, Justice Fields could not have put it any more convincingly, "first, to furnish the accused with such a description of the charges against him as will enable him to make his defence, and to avail himself of his conviction or acquittal for protection against a further prosecution for the same cause." *Hess* at 487. Justice Fields protected Hess' Fifth and Sixth Amendment rights.

The respondent should be entitled to the same protection as Justice Fields stated that *Hess* was entitled to. To be more precise and to analogize this case with Justice Field's phrase as to generic and species terms, pursuant to §§924(c)(1)(A) and

(B) 1998 version, the firearm would be the generic term while the machinegun is the species term.

If this Court decides that the machine gun is an element and has to be pled in the indictment, the issue is decided.

However, if this Court decides that the machine gun is a sentencing factor and may be decided by a judge by the preponderance of the evidence at a sentencing hearing, that decision eliminates the defendant's rights under the Fifth Amendment to the United States Constitution, which states in pertinent part, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury...without due process of law...". When the court violates the defendant's Fifth Amendment rights it also violates the defendant's Sixth Amendment right to a jury trial.

There is no legal argument that supports Congressional intent to have opposite meanings in statutes that have the same structure which are identical in substance. See 18 U.S.C. §2119 and 18 U.S.C. §924(c)(1).

II. THIS CASE DOES NOT CONFLICT WITH *CASTILLO*

Petitioner's argues a second issue, in that, the First Circuit's ruling, "conflicts with this Court's reasoning in *Castillo v. United States* 530 U.S. 120, 124-131 (2000) and *Harris v. United States*, 536 U.S. 545, 552-556 (2002)." Pet. Brief at 10.

Respondent states *Harris and* Castillo are irreconcilable, and this case cannot be reconciled with both of those opinions. If the petitioner is arguing that there is a conflict between *Castillo* and *Harris* the respondent agrees.

Judge Wolf's analysis and decision, upheld by the First Circuit is consistent with *Castillo*, and is not irreconcilable with *Harris*. The *Harris* court only decided the use of a firearm issue as a sentencing factor in section (A) and did not decide whether the firearm type provision in section (B) was either a sentencing factor or an element.

The *Harris* Court ruled, a traditional seven year sentence pursuant 18 U.S.C. §§924(c)(1)(A)(ii), defined brandishing as a sentencing factor, and was better left to a judge to decide, by the standard of preponderance of the evidence.

The *Castillo* Court ruled, that a thirty year sentence with regards to a machine gun in 18 U.S.C. §924(c)(1)(a) (1988 Ed. Supp. V), now 18 U.S.C. §§924(c)(1)(B)(ii), the Firearm Type Provision, was an element better left for a jury to decide using the standard beyond a reasonable doubt.

In fact, Judge Wolf in his ruling followed *Castillo*'s reasoning and analogy, concluding that a machinegun was an element of §§924(c)(1)(B)(ii). Pet. Appendix "A" pages 7a-10a.

The 1998 version of §924(c)(1)(a) has two separate and distinct subsections, (A) and (B), and they are separated by a period. Each distinct subsection has its own independent thought. This independent thought processes separates the use of a weapon from the firearm type provision.

Judge Wolf used the same reasoning in reaching his conclusion. "The structure of the statute favors the conclusion that 'machine gun' is an element, not a sentencing factor. If it were only a sentencing factor, it could and should have been listed under Section 924(c)(1)(a) [sic] with the traditional sentencing factors like 'brandishing.' Instead, including 'machine gun' in Section 924(c)(1)(b) [sic] manifests an

understanding of the traditional distinction between the way a weapon is used and the nature of the weapon itself." Pet. App. C at 17a.

Judge Wolf found that a machine gun has been traditionally treated as an element of §924(c)(1) 1998 version prior to *Castillo v. United States*, 530 U.S. 120 (2000). See *Smith v. United States*, 508 U.S. 223, (1993). "Most important here, the indictment alleged that the petitioner knowingly used the MAC-10 and its silencer..." *Smith* at 226. Also in *United States v. Melvin*, 27 F.3d 710, (1st Cir. 1994) the government stated, "that a defendant found guilty of violating §924(c) may be sentenced to a thirty-year term only if the jury specifically identifies a machinegun or silencer as the firearm supporting the conviction." *Melvin* at 714. In addition see *United States v. Alerta*, 96 F. 3d 1230, (9th Cir. 1996); *United States v. Moore*, 958 F.2nd 310 (10TH Cir. (1995); *United States v. Sims*, 975 F.2d 1225, (6th Cir. 1992); which all were charged in the indictment of using and/or carrying a machine gun in relation to a drug or violent crime.

There has been no ruling by this Court that *Castillo* was overruled.

The petitioner wishes this Court to believe that in 1998 when Congress enacted the new version of §924(c)(1) with its new subsections, it made both subsections sentencing factors.

Congress in 1998 amended 18 U.S.C. §924(c)(1) as a result of the decision in *Bailey v. United States*, 516 U.S. 137 (1995). The Bailey Court interpreted the text 'use' to mean 'active employment of the firearm by the defendant. The *Bailey* Court held, "in order to 'use' a firearm in relation to a drug-trafficking crime within the

meaning of 18 U.S.C. §924(c)(1), a criminal defendant must actively employ the weapon." *Bailey* at 506

Congress was disturbed with the *Bailey* decision and as a result amended 18 U.S.C. §924(c)(1988 Ed. Supp. V). However, nowhere in the Congressional record did Congress state that its intention was to create subsections as sentencing factors.

Just as Congress addressed the use issue as a result of *Bailey*, Congress could and should have addressed this issue in 18 U.S.C. §924(c)(1)(B)(ii), if Congress was disturbed with the decision in *Castillo*, but it did not.

Subsequent to the 1998 amendment of 18 U.S.C. §924(c)(1) Congress has amended that statute on three occasions. Congress chose not to take any action or make any changes as a result of the Court's decision in *Castillo* as it did in response to the *Bailey* decision

Congress was well aware of the language necessary to create sentencing factors. In 1986, this Court decided *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) in which a similar issue was raised with regards to when a defendant visible possession [brandishes] a weapon. The Pennsylvania legislature enacted 42 Pa.C.S.A. §§9712(a) and 9712(b) in crystal clear language separating the sentencing provision of the visible possession (the use) of a firearm in §(a) from the standard of proof in §(b). The statute reads in §(a) that if convicted of the visible possession of a firearm a defendant would receive at least five years. In §(b) the Pennsylvania legislature enacted the standard of proof for conviction under §(a) "Provisions of this section shall not be an *element of the crime*...and shall determine, *by the preponderance* of the evidence, if this section is applicable." *McMillan* at 82. (Emphasis Supplied)

In 1998, if Congress intended that the firearm type provisions in section (B) were to be sentencing factors and were to be decided by the preponderance of the evidence standard, Congress could have easily inserted the above or similar language contained in 42 Pa.C.S.A. §§9712(a) and 9712(b) into18 U.S.C. §924(c)(1), but it did not

The petitioner states that there are six Circuit Courts of Appeal's cases that have already held that the firearm's characteristics need not be charged in the indictment or found by a jury beyond a reasonable doubt.

The respondent states that the 18 U.S.C. §§924(c)(1)(B)(i) and (ii) Firearm Type Provisions do not state the characteristics[1] of the weapon. The subsections define the nature of the weapons: i.e. (i) short-barreled rifle, short-barrel shotgun, or semiautomatic assault weapon...; (ii) machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler... These are the not the weapons characteristics

The characteristics of semiautomatic assault pistols were discussed when the Senate and House Bills were being acted upon regarding 18 U.S.C. 921(a)(30). Mr. Reynolds in introducing H.R. 3184 identified the characteristics of a semiautomatic assault weapon as follows: (1) an ammunition magazine that attaches to the pistol outside of the pistol grip; (2) a threaded barrel capable of accepting a barrel extender, (3) a flash suppressor; (4) a forward hand grip, or silencer; (5) a manufactured weight of 50 ounces or more when the pistol is unloaded; and (6) a semiautomatic version of

---

[1] Characteristics of weapons are defined in the legislative history of 18 U.S.C. 921(a)(30)

an automatic firearm. Mr. Reynolds then identified the characteristics of a shotgun under the semiautomatic assault weapon provision as follows: (1) a folding or telescoping stock; (2) a pistol grip that protrudes conspicuously beneath the action of the weapon; (3) a fixed magazine capacity in excess of 6 rounds; and (4) an ability to accept a detachable magazine. See Senate Bill S653; and H.R. 3184 introduced by Mr. Reynolds, (1993).

An example of a characteristic of a machinegun is a selector switch. For instance, a machine gun that fires automatically would have three modes/positions: safety, auto, and semi. A semiautomatic would only have two modes on the selector switch: safety and fire. Those are characteristics of machine gun and semi assault weapon respectively.

Thus, the First Circuit's ruling is not in conflict with this Court's reasoning in *Castillo*.

III. THERE IS NO CIRCUIT SPLIT CONCERNING THE RESPONDENT'S FIFTH AND SIXTH AMENDMENT RIGHTS

The petitioner cites the six Courts of Appeals' decisions as a basis for its argument that there is an existing conflict.

However, in those cases the defendants received notice of the nature of the weapon charged in the indictment. The indictment either cited the particular section of §§924(c)(1)(B)(i) or (ii) or identified the type of weapon in the overt act. As such, those defendants did not have their Fifth or Sixth Amendment Rights violated.

The first case cited by the petitioner is *United States v. Cassell*, 530 F.3d 1009, (D.C. Cir. 2008), cert. denied, 129 S.Ct. 1038 (2009).

On August 24, 2000, Dwayne Cassell was indicted in the District of Columbia by a federal grand jury. *Cassell*, inter alia, was charged that he did "unlawfully and knowingly use and carry during and in relation to, and possess in furtherance of, a drug trafficking offense, for which he may be prosecuted in a court of the United States, that is Count One of this indictment which is incorporated herein, firearms, that is, a Cobray PM-11 9mm assault pistol and a Colt AR-15 assault rifle. (Using, Carrying and Possessing a Firearm During a Drug Trafficking Offense, in violation of Title 18, United States Code, Sections 924(c)(1) and 924(c)(1)(B)(i))" Cassell was convicted of the drug offense and convicted of Count Three charging Cassell under Sections 924(c)(1) and 924(c)(1)(B)(i).

Cassell's Fifth Amendment rights were not violated. Cassell was notified by the indictment that he was being charged with a semi assault weapon under 924(c)(1)(B)(i), making the semi assault weapon an element of the offense in 924(c)(1). Cassell was tried and found guilty of 924(c)(1)(B)(i) by a jury using the beyond a reasonable doubt standard. In addition, Cassell's Sixth Amendment rights were not violated.

The next case petitioner cites is *United States v. Harrison*, 272 F.3d 220 (4th Cir. 2001), cert denied, 537 U.S. 839 (2002). Mr. Harrison contended that the MAC-11 charged in the indictment did not state that it was a semiautomatic assault weapon. The indictment charged Harrison, "with knowingly using and carrying a 'Mac-11 semi-automatic pistol." *Harrison* at 225. Harrison argued that his case should either be remanded or reversed, because the government left out the phrase, assault weapon, in the indictment. See *Harrison* n10. However, a federal agent testified that the actual

MAC-11 in the indictment, was in actuality a SWD M-11, a weapon listed under the semi-automatic definition pursuant to §921(a)(30). Harrison was charged in the indictment, tried and convicted by a jury. Harrison had no Fifth and Sixth Amendment Violations.

The next case petitioner cites is *United States v. Sandoval*, 241 F.3d 549 (7th Cir. 2001), cert denied, 534 U.S. 1057 (2001). This case was distinguished by Judge Wolf in his ruling from *United States v. Harris*, 397 F.3d 404 (2005). Judge Wolf stated, *Sandoval* did not consider all the factors that this Court did in *Castillo*, which *Harris* did when considering the §924(c)(1) issue. See Pet. App. C at 16a. The reading of *Sandoval* and the search of records do not illustrate, that any words were used in the indictment describing the semiautomatic assault weapon that Sandoval used or carried. However, the Circuit Court agreed with the other circuits, stating that instead of being an element of a separate offense, the weapon characteristics was a sentencing factor and can be decided by the preponderance of the evidence by a judge.

The next case petitioner cites is *United States v. Gamboa*, 439 F.3d 796 (8th Cir.), cert denied, 549 U.S. 1042 (2006). In *Gamboa* it is important to note that the defendant was charged in the overt acts with use and carry, in addition to possession, of having specific weapons, which pertained to counts four and five in the indictment. See *Gamboa* at 809-810. Gamboa's Fifth and Sixth Amendment Rights were not violated.

The next case petitioner cites, is *United States v. Avery*, 295 F.3d 1158 (10th Cir.), cert denied, 537 U.S. 1024 (2002). Avery was charged with numerous counts of

§924(c)(1) violations, with each count listing specific firearms. Although, Avery was not charged pursuant to §924(c)(1)(B)(i), the indictment in Count Six read, "Mr. Avery with knowingly possessing a 'Colt AR 15 .223 Caliber...during and in relation to a drug trafficking crime,'...". There was no mention in the indictment or an instruction to a jury that the AR 15 was a semiautomatic assault weapon. However, the *Avery* Court determined that as long as the AR 15 was mentioned in Count Six it was enough notice to Avery, because 18 U.S.C. §921(a)(30) listed the AR 15 as a semiautomatic assault weapon. Avery's Fifth and Sixth Amendment Rights were not violated. See *Avery* at 1172.

The next case petitioner points out is *United States v. Ciszkowski*, 492 F.3d 1264 (11th Cir. 2007). Ciszkowski's claim was that the government violated his Six Amendment due process claim, in that the trial judge fail to give a jury instruction that he had knowledge of the silencer before finding him guilty. The indictment read in pertinent part, "Wojtek Ciszkowski, the defendant herein, did knowingly and unlawfully possess a firearm, that is a Ruger pistol, equipped with a firearm silencer, in furtherance of a crime of violence and a drug trafficking crime..." Ciszkowski was charged in the indictment with a silencer, and a jury found him guilty of having a silencer using the beyond a reasonable doubt standard. In addition, Ciszkowski was convicted of the drug violation pursuant 21 U.S.C. 841(a)(1) and (b)(1)(C).

Ciszkowski was notified by the indictment of being charged with a silencer pursuant to 18 U.S.C. 924(c)(B)(ii), thus making the silencer in that section an element of 924(c)(1). Ciszkowski was charged and the jury convicted him using the standard

beyond a reasonable doubt under §924(c)(1)(B)(i) as he was charged. There was no Fifth or Sixth Amendment Violations.

The last case petitioner points out is *United States v. Dixon*, 273 F.3d 636, 640 n.2 (5th Cir. 2001) (dicta), cert. denied, 537 U.S. 829 (2002). Dixon was indicted and charged with carrying a short-barreled shotgun under the 1988 version of 18 U.S.C. §924(c)(1), now 18 U.S.C. §924(c)(1)(B)(i). This case supports the respondent's argument that the government traditionally treated the weapons mentioned in §924(c)(1)(B)(i) as elements of §924(c)(1). *Dixon* at 637.

The Courts of Appeals decisions cited do not provide a basis for the petitioner's argument that there is an existing conflict.

THE COBRAY CM-11 Ser. #94-00114612
IS IN CONTROVERSY THAT IT IS A MACHINEGUN

The petitioner states in its last sentence, "Conversely, reversing the decision below would lead to resentencing, at which the government's laboratory testing showing the Cobray pistol's fully automatic action, See Gov't Supp. C.A. App. 9, 53, likely would be uncontroverted". Pet. Brief at p. 20.

Nothing could be the further from the truth and the respondent would challenge that the weapon fired fully automatic in the automatic mode.

Since the date when the respondent received the FBI Examiner's report, stating that the Cobray (K1) in question "functions on the automatic mode only. Accordingly, the K1 pistol would be described as a 'machine gun.'", the respondent has uncontrovertibly stated to the government at District Court hearings, and in his briefs

to the First Circuit that the alleged machinegun was not a machine gun, but a semi automatic pistol.

The government, during discovery process, produced documents that established by its own records as well as other records that the Cobray pistol was manufactured by Leinad, Inc. on March 22, 1999, as a Semi-automatic pistol. Leinad, Inc. then sold the same Cobray to Southern Ohio Gun supplier International ("SOG"), of Lebbon, Ohio, on May 27, 1999 as a semi-automatic pistol. SOG then sold the Cobray to a dealer, Firepower Inc. on or about July 21, 1999, as a semi-automatic pistol. On or about October 3, 1999, the owner of the Cobray, of Lumberton, NC, purchased the semi-automatic Cobray pistol from Firepower Inc.

On June 15, 2006 the purchaser reported that the semi-automatic Cobray pistol was stolen either in the later part of 2002 or the early part of 2003, and he reported the theft to the Lumberton police department. He stated when it was stolen the Cobray was a semiautomatic weapon.

On June 16, 2005, the FBI searched the residence of a co-conspirator and found the semi-automatic Cobray pistol in his apartment. Shortly after the search that co-conspirator became an informant. On March 2, 2007, the informant was interviewed, by FBI agents. Part of that interview pertained to the semi-automatic Cobray. The co-conspirator was asked if he was aware that the MAC 11 (Cobray pistol) functioned fully automatic. He answered that he "...was not aware that the MAC 11 functioned fully automatic or as a machinegun.".

On February 23, 2007 another co-conspirator, also an informant, was also interviewed by FBI agents. Part of that interview pertained to the semi-automatic

Cobray. That co-conspirator was asked if he was aware that the MAC 11 (Cobray pistol) was fully automatic. He answered "...that he was not aware if the MAC 11 pistol was fully automatic.". He was also asked if the defendants were aware the Mac 11 pistol was fully automatic. He answered, "...he was not aware if ... [defendants] knew if the Mac 11 pistol was fully automatic ".

In the FBI Examiner' notes of the Firearm/Toolmark Unit of the FBI Laboratory, the examiner noted in his report and bench notes that the Cobray "functions on automatic mode only 'machinegun'". Neither his notes nor his report reflect that the Cobray fired fully automatic. However, in the FBI Examiner's second report, dated December 1, 2005 he states, "...when test-fired, operated only in automatic mode and thus meets the definition of a "machinegun,...".

The FBI Examiner never mentioned that there was any evidence that the Cobray was modified prior to him test firing it or that it fired *fully* automatic. Emphasis Supplied. In addition respondent would likely provide a firearm expert who would dispute all the issues including the fact that the Cobray operated as a fully automatic machinegun in the automatic mode

CONCLUSION

The petition for writ of certiorari should be denied for all of the above reasons.

Respectfully submitted,

Timothy P. O'Connell
Counsel of Record
Law Office of Timothy P. O'Connell
C-8 Shipway Place
Charlestown, MA 02129
Tel No. 617-242-4806

August 24, 2009

REPLY BRIEF

(2)

No. 08-1569

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

A. The circuits are divided on the question presented 2
B. The conflict merits this Court's attention 3
C. The court of appeals' decision is incorrect 6
D. This case is a good vehicle for resolving the conflict 9

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 516 U.S. 137 (1995) 8
Castillo v. *United States*, 530 U.S. 120 (2000) 5
Dean v. *United States*, 129 S. Ct. 1849 (2009) 6
Harris v. *United States*, 536 U.S. 545 (2002) 5, 7
Jones v. *United States*, 526 U.S. 227 (1999) 7
Morales v. *TWA*, 504 U.S. 374 (1992) 8
Staples v. *United States*, 508 U.S. 600 (1994) 6
United States v. *Booker*, 543 U.S. 220 (2005) 9
United States v. *Cassell*, 530 F.3d 1009 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1038 (2009) 2, 7
United States v. *Ciszkowski*, 492 F.3d 1264 (11th Cir. 2007) 2
United States v. *Harris*, 397 F.3d 404 (6th Cir. 2005) .. 2, 3

Statutes and rules:

18 U.S.C. 924(c) 3, 5, 8
18 U.S.C. 924(c)(1) 3, 4, 7
18 U.S.C. 924(c)(1)(A) 7
18 U.S.C. 924(c)(1)(A)(ii) 5

Statutes and rules—Continued: Page

18 U.S.C. 924(c)(1)(A)(iii) 5, 6
18 U.S.C. 924(c)(1)(B) ..... *passim*
18 U.S.C. 924(c)(1)(B)(i) 5
18 U.S.C. 924(c)(1)(B)(ii) 1, 3, 4, 5, 9, 11
18 U.S.C. 924(c)(1)(C) 7
18 U.S.C. 924(c)(1)(D) 7
18 U.S.C. 3731 10
18 U.S.C. 3742 10
Fed. R. Crim. P.:
Rule 11(b)(1)(I) 11
Rule 32(i)(3)(B) 10

In the Supreme Court of the United States

No. 08-1569

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The petition for a writ of certiorari asks the Court to resolve a 6-2 circuit conflict over whether the types of firearms listed in 18 U.S.C. 924(c)(1)(B)(ii) are offense elements that must be charged in the indictment and proved to the jury beyond a reasonable doubt, or sentencing factors to be found by the district judge by a preponderance of the evidence. Respondents make no plausible arguments to dispute the conflict, but claim that it affects too few cases to warrant this Court's attention. Yet the question presented is recurring and important, and it arises in cases that are particularly significant to the government's efforts to combat violent crime and drug trafficking. These cases involve the most dangerous types of firearms, capable of causing the most harm and fear, such as machineguns, sawed-off shotguns, and bombs.

Respondents also err in suggesting that the decision below is correct or that this case is an inappropriate vehicle for resolving the question presented. Section 924(c)(1)(B)'s text and structure establish that it states sentencing factors, not elements. The government preserved this claim repeatedly in the district court, and if the government prevails in this Court, that decision will afford the government a fair opportunity to secure the enhanced sentence that the lower courts' rulings precluded.

A. The Circuits Are Divided On The Question Presented

As the First Circuit acknowledged, Pet. App. 4a-5a, its decision accord with the decision in *United States* v. *Harris*, 397 F.3d 404 (6th Cir. 2005), but conflicts with the decisions of six other circuits. See Pet. 11-12.

Respondent Burgess concedes the split. Br. in Opp. 6. Respondent O'Brien attempts to deny it by classifying each case according to its factual and procedural history, rather than by the court of appeal's stated holding. Br. in Opp. 18-23. In some of the cases the indictment or a special verdict form may have addressed the firearm type—certainly the safest course in a case of first impression in a circuit. But in each case the court of appeals held that Section 924(c)(1)(B) states sentencing factors, and in none of the cases was the factfinder required to find the type of firearm beyond a reasonable doubt. See, *e.g.*, *United States* v. *Cassell*, 530 F.3d 1009, 1011-1012 (D.C. Cir. 2008) (court of appeals approved jury instructions referring merely to "firearm"), cert. denied, 129 S. Ct. 1038 (2009); *United States* v. *Ciszkowski*, 492 F.3d 1264, 1268 (11th Cir. 2007) (although jury rendered special verdict that firearm was equipped with a silencer, court of appeals held that "the firearm char-

acteristics in [Section] 924(c) are sentencing factors intended to be determined by the judge").

B. The Conflict Merits This Court's Attention

The question presented is important and recurring, and the conflict will not be resolved without this Court's intervention.

1. Burgess contends that review should be denied because the conflict is not "new." Br. in Opp. 6. But the split only arose in 2005, when the Sixth Circuit diverged from three other circuits and concluded that Section 924(c)(1)(B) stated elements of separate offenses. *Harris*, 397 F.3d at 413-414. When the Sixth Circuit stood alone in its view, there was a reasonable chance that it would reconsider, perhaps in light of the three additional circuits that later came to disagree with it. Now, though, the First Circuit has joined the Sixth Circuit and denied rehearing en banc with a full view of the split; the chance that the First and Sixth Circuits will both realign their views is remote.

2. Burgess argues that the question presented is unimportant because it affects only a "small[] sub-subset of an already tiny percentage" of cases. Br. in Opp. 12; see *id.* at 6-13. Burgess reasons that because Section 924(c)(1)(B)(ii) always results in a prison sentence of 30 years or longer, and statistics show such sentences are a small percentage of all sentences imposed for violations of Section 924(c)(1), the question of how to interpret Section 924(c)(1)(B)(ii) is unworthy of this Court's review. He maintains that even his sentencing statistics overstate the number of cases affected by the question presented because those statistics also count (1) lengthy Section 924(c) sentences that are not imposed under Section 924(c)(1)(B)(ii), and (2) cases the government

could successfully prosecute irrespective of whether Section 924(c)(1)(B)(ii) is an element of the offense or a sentencing factor, see pp. 5-6, *infra*. And he further infers that the "numbers or percentages" of 30-year and life sentences within the Sixth Circuit were not "significantly different from those in the district courts of the other circuits," and did not change following the Sixth Circuit's decision in *Harris*. Br. in Opp. 12.

Even apart from overlooking the legal significance of the circuit split—which has generated eight published appellate decisions in as many years—Burgess's statistical approach is flawed in three respects.

First, Burgess is wrong to focus on the percentage of Section 924(c)(1) cases that are subject to Section 924(c)(1)(B), rather than the absolute number of such cases. The absolute numbers here are substantial. By his own count, the specific question presented here could have affected as many as 185 cases over a five-year period. See Burgess Br. in Opp. App. A1-A3. Accumulated over many years, the number of sentences directly affected by the Court's decision would be substantial indeed—and the importance of those cases is magnified because each involves a dangerous firearm capable of inflicting great harm.

Second, Burgess's efforts to make cross-circuit and intertemporal comparisons are not well-supported. Most prominently, the raw statistics cannot reveal the extent to which actual criminal conduct may have varied circuit-to-circuit and over time. The statistics thus cannot show how many cases may have been impeded by the Sixth Circuit's (and now the First Circuit's) approach.

Third, Burgess does not consider the strong likelihood that this Court's interpretation of Clause (B)*(ii)* will also govern the proper interpretation of Clause

(B)(*i*). Clause (B)(i) parallels Clause (B)(ii) in text and structure; every sound guide for interpreting one applies equally to the other. Indeed, in *Harris* v. *United States*, 536 U.S. 545 (2002), the narrowest issue before this Court was whether Section 924(c)(1)(A)(ii) (which prescribes a seven-year mandatory minimum sentence for brandishing a firearm) states a sentencing factor, but the Court made clear that its analysis and holding applied equally to the parallel provision in Clause (A)(iii) (which prescribes a ten-year mandatory minimum sentence for discharging a firearm). See *id.* at 556 ("The statute regards brandishing and discharging as sentencing factors to be found by the judge."). Likewise, this Court's interpretation of Clause (B)(ii) should control the interpretation of Clause (B)(i). Just as in *Castillo* v. *United States*, 530 U.S. 120 (2000), a decision in this case will effectively interpret all "the firearm type-related" provisions of Section 924(c). *Id.* at 131. And that consequence greatly expands the universe of cases that will be affected by the Court's resolution of the circuit split.

3. Burgess also suggests that in only a small number of cases will the government be unable to meet the higher burden of proof required to establish an offense element. Br. in Opp. 11. It is easy for Burgess to suggest that the government will normally prevail (while vowing to challenge the government's proof, see *id.* at 16, and having a co-defendant who boldly asserts that the government will lose, see O'Brien Br. in Opp. 23-25). But the reality is that, even apart from the higher burden of proof, the government will encounter enhanced substantive burdens if, as it assumed below (see Pet. 8, 19), the consequence of treating Section 924(c)(1)(B)(ii) as an offense element is that the government must also prove the defendant's knowledge of the nature of the

firearm. "[V]irtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun," yet "[s]uch a gun may give no externally visible indication that it is fully automatic," *Staples* v. *United States*, 511 U.S. 600, 615 (1994). That in turn makes it difficult or impossible for the government to prove a defendant's knowledge of the nature of the firearm other than by specific witness testimony on that issue, which the government often lacks.

The question presented does not embrace whether the government must prove the defendant's knowledge of firearm type if Section 924(c)(1)(B) states offense elements. See Pet. I, 8 n.2. Nor, contrary to Burgess's claim (Br. in Opp. 16-17), does that limitation undermine the appropriateness of the case for review. The decision whether the type of firearm is an offense element or sentencing factor is logically antecedent to the knowledge question; the government did not contest below that it would have to prove respondents' knowledge of the Cobray's characteristics if firearm type were an offense element (Pet. 19); and the court below only alluded to the issue in passing (Pet. App. 8a). And if this Court resolves this case by holding that firearm type is a sentencing factor, its decision in *Dean* v. *United States*, 129 S. Ct. 1849 (2009) (holding that accidental discharge of a firearm justifies an enhanced minimum sentence under Section 924(c)(1)(A)(iii)), virtually ordains that no knowledge requirement would apply.

C. The Court Of Appeals' Decision Is Incorrect

As discussed in the petition (at 13-18), the text and structure of Section 924(c)(1)(B) require interpreting it as stating sentencing factors. Tellingly, respondents

ignore the statute's express statement that its mandatory minimum sentences apply to "a person *convicted of* a violation of this subsection," 18 U.S.C. 924(c)(1)(B) (emphasis added). As the D.C. Circuit explained, "[t]he use of the phrase 'convicted of a violation' indicates that the provision is to be applied only after a conviction and, hence, only at sentencing." *Cassell*, 530 F.3d at 1017. Moreover, the statute is structured such that this Court "presume[s] that its principal paragraph defines a single crime and its subsections identify sentencing factors." *Harris*, 536 U.S. at 553. Respondents do not counter these arguments or provide any other persuasive support for the First Circuit's reading.

1. Respondents argue that Section 924(c)(1)(B) is structurally similar to the carjacking statute held in *Jones* v. *United States*, 526 U.S. 227 (1999), to state offense elements. Burgess Br. in Opp. 18-19; O'Brien Br. in Opp. 8-9. But the better structural parallels to Section 924(c)(1)(B) are the provisions located closest to it—Section 924(c)(1)(A), which this Court held in *Harris* states sentencing factors, and Sections 924(c)(1)(C) and (D), which similarly are understood to do so, see Pet. 16 & n.5.

Respondents also rely on the "traditional treatment of the fact at issue" and its "impact on sentencing" in support of their interpretation of the statute. Burgess Br. in Opp. 19; see O'Brien Br. in Opp. 10, 14. But assuming it is "traditional" to treat firearm type as an offense element, Congress can (within constitutional limits) write a statute that overcomes that tradition, which is what Congress did here. And while this Court adverted to policy, tradition, and impact to support its conclusions in *Jones*, *Castillo*, and *Harris*, in none of those cases did the Court use these factors to reach a conclu-

sion that contradicted the text of the statute, as respondents advocate here.

2. Respondents also offer three arguments based on legislative history. *First*, respondents argue that the 1998 overhaul of Section 924(c) was intended only to reverse *Bailey* v. *United States*, 516 U.S. 137 (1995), and "nowhere in the Congressional record did Congress state that its intention was to create subsections as sentencing factors." O'Brien Br. in Opp. 15; see Burgess Br. in Opp. 21-22. But "legislative history need not confirm the details of changes in the law effected by statutory language before [this Court] will interpret that language according to its natural meaning." *Morales* v. *TWA*, 504 U.S. 374, 385 n.2 (1992).

Second, O'Brien suggests that if Congress disagreed with *Castillo*, it should have amended the statute. Br. in Opp. 16. But when *Castillo* was decided in June 2000, the statute had already been replaced with a new version. Moreover, this Court's 2002 decision in *Harris* would have given Congress every reason to expect that the Court would interpret Section 924(c)(1)(B) as stating sentencing factors.

Third, O'Brien contends that if Congress had intended Section 924(c)(1)(B) to establish sentencing factors, it could have used more explicit language. Br. in Opp. 16-17. But Section 924(c)(1)(B)'s "convicted of" phrasing *is* explicit, see p. 7, *supra*, and in any event, this Court has never announced the sort of clear statement rule O'Brien seems to suggest.

3. Finally, constitutional avoidance concerns provide no basis for treating firearm type as an offense element. See Burgess Br. in Opp. 22-23. This Court's decision in *Harris* settled that Congress may constitutionally provide for judicial fact-finding that raises a minimum sen-

tence within an otherwise authorized range. This case involves no question of whether the court's finding of firearm type would be a fact necessary to justify the reasonableness of a sentence under *United States* v. *Booker*, 543 U.S. 220 (2005), because Congress has already specified the sentence, and it is not subject to appellate review under *Booker* for reasonableness.

D. This Case Is A Good Vehicle For Resolving The Conflict

Notwithstanding respondents' claims to the contrary, see Burgess Br. in Opp. 13-17; O'Brien Br. in Opp. 23-25, the government rigorously preserved the question presented, and this case is an appropriate vehicle for addressing it.

1. The government preserved its claim by arguing in pretrial filings that firearm type was a sentencing factor, see, *e.g.*, Dkt. 204 at 2-3, and then, after the district court rejected that argument, by arguing in its written objections to the Presentence Report that respondents were subject to a 30-year mandatory minimum sentence pursuant to Section 924(c)(1)(B)(ii) because the Cobray pistol was a machinegun, see Gov't Supp. C.A. App. (Burgess) 84; Gov't Supp. C.A. App. (O'Brien) 37. See also Dkt. 245 at 1 n.1 (government's motion for upward departure preserving argument that Section 924(c)(1)(B) states sentencing factors). The district court even acknowledged at sentencing that the government was "seeking to be especially careful to preserve that issue for appeal." Gov't C.A. App. 192. On appeal, neither respondent contended that the government had failed to preserve its argument that Section 924(c)(1)(B)(ii) states sentencing factors. See O'Brien C.A. Br. 10-41; Burgess C.A. Br. 11-38. The court of appeals likewise gave no indication that the government

had failed to preserve the single issue presented on appeal, and it squarely resolved that issue in a published opinion that establishes circuit precedent and explicitly rejects the holdings of six other circuits. See Pet. App. 1a-10a.

Burgess is mistaken to suggest (Br. in Opp. 14) that the government could preserve its claim only by seeking interlocutory review of the district court's ruling that firearm type is an offense element. An interlocutory appeal under 18 U.S.C. 3731 was not available to the government, because on the government's theory, the dismissal of Count 4 (the only basis for an interlocutory appeal) was correct. The district court's error was failing to impose a 30-year mandatory minimum sentence for Count 3, a decision the government timely appealed under 18 U.S.C. 3742 after sentence was pronounced. See Pet. 7-8 (recounting procedural history in the district court).[1]

2. Respondents contend that if the government prevails in this Court, additional proceedings will be necessary before they would be subject to a 30-year mandatory minimum sentence. Burgess suggests that respondents would be entitled to vacate their guilty pleas, and both respondents say they would contest a finding that the Cobray was a machinegun. See Burgess Br. in Opp. 15-16; O'Brien Br. in Opp. 23-25.

If the government prevails in this Court, respondents will face the possibility of an increased mandatory mini-

---

[1] Burgess also seems to suggest that the government's failure to insist on a factual finding that the Cobray was a machinegun is a reason for this Court to decline to review the case. See Br. in Opp. 14-16. But given the district court's prior legal rulings, resolution of that issue was not necessary to respondents' sentences, so the court was under no obligation to resolve it. See Fed. R. Crim. P. 32(i)(3)(B).

mum sentence of which they were not advised before pleading guilty. See Fed. R. Crim. P. 11(b)(1)(I) (requiring court to inform the defendant of any mandatory minimum penalty). The government therefore agrees that if this Court rules that Section 924(c)(1)(B)(ii) establishes a sentencing factor rather than an offense element, further proceedings on the question of guilt may be warranted. And of course respondents would be entitled to be heard at sentencing regarding whether the Cobray is a machinegun—though their briefs offer nothing concrete to contradict the government's lab testing demonstrating that fact.[2] Neither consideration makes this case an inappropriate vehicle for resolving the question presented, however, because neither raises any doubt that this Court's decision will be determinative of future proceedings in this case.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

SEPTEMBER 2009

---

[2] O'Brien's factual discussion of the Cobray's history (see Br. in Opp. 23-25) refers extensively to documents that are apparently not in the record, and is largely irrelevant given the government's testing of the gun.

JOINT APPENDIX

Supreme Court, U.S.
FILED
NOV 25 2009
OFFICE OF THE CLERK

No. 08-1569

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOINT APPENDIX

ELENA KAGAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioner

TIMOTHY P. O'CONNELL
C-8 Shipway Place
Charlestown, MA 02129
(617) 242-4806

Counsel of Record
for Respondent O'Brien

LESLIE FELDMAN-RUMPLER
101 Tremont Street, Suite 708
Boston, MA 02108
(617) 728-9944

Counsel of Record
for Respondent Burgess

TC only
592864
Doc #28

PETITION FOR A WRIT OF CERTIORARI FILED: JUNE 23, 2009
CERTIORARI GRANTED: SEPT. 30, 2009

900
b
58

TABLE OF CONTENTS

Page

Court of appeals docket entries 1

District court docket entries 8

Second superseding indictment (Feb. 21, 2007) 19

Transcript excerpts:

Final pretrial conference (Mar. 29, 2007) 22

Plea hearing (Apr. 2, 2007) 39

Sentencing hearing (June 20, 2007) 44

Government's response to defendants' motion to strike portions of Count 3 (filed Mar. 22, 2007) 49

Government's further response to defendants' motion to strike portions of Count 3 (filed Mar. 29, 2007) 54

Clerk's notes (Apr. 2, 2007) 56

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No. 07-2312

UNITED STATES OF AMERICA, APPELLANT

v.

MARTIN O'BRIEN AND ARTHUR BURGESS, APPELLEES

DOCKET ENTRIES

DATE	PROCEEDINGS
9/4/07	CRIMINAL CASE docketed. Opening forms sent. Notice of Appeal filed by Appellant US. Appearance form due 9/18/07. Docketing Statement due 9/18/07. Transcript Report/Order 9/18/07. [07-2312] (LM)
9/4/07	RECORD filed: 3 volumes consisting of docket entries 1-6, 8-18, 20, 21, 23-30, 32-40, 42-44, 46, 47, 49, 51-53, 55-71, 74-89, 91-103, 105, 106, 108-117, 121-124, 127-132, 134-137, 139-145, 150-155, 157-166, 168-173, 175, 177-192, 194, 196, 198, 200, 201, 204-208, 210, 212, 213, 215-223, 225-242, 244-246, 248-250, 252-254, 256, 257, 259, 260, 262, 266, 267, 269-272. [DE 263-265 Transcripts FILED UNDER

DATE	PROCEEDINGS
	SEAL] Transcripts filed by Richard Romanow. [1283908-1] [07-2312] (LM)
9/4/07	Transcript of March 29, 2007, Pretrial Conference and April 2, 2007 Plea hearing filed by court reporter Richard Romanow. [07-2312] (LM)
	* * * * *
1/29/08	BRIEF filed by Appellant US. Length: 40 pages (10,681 words), Copies: 11, Served by mail. Certificate of service date 1/28/08. [1330361-1] Appellee brief due 3/3/08. [07-2312] (CD)
	* * * * *
1/29/08	APPENDIX filed by Appellant US. Copies: five. Volumes: one. Delivered by mail. Certificate of service date 1/28/08 [1330368-1] [07-2312] (CD)
	* * * * *
2/8/08	SEALED SUPPLEMENTAL APPENDIX filed by Appellant US. Copies: 5. Volumes: 1. Delivered by mail. Certificate of service date 1/28/08 [1333689-1] [07-2312] (LM)
	* * * * *

DATE	PROCEEDINGS
5/2/08	BRIEF filed by Appellee Martin O'Brien. Length: 41 pages, 12,261 words. Copies: 10. Certificate of service dated 05/02/2008.. [07-2312] (CD)
	* * * * *
5/2/08	PLEADING Tendered: Appellee's Brief filed by Appellee Arthur Burgess. Certificate of service dated 05/02/2008. [07-2312] (CD)
	* * * * *
6/2/08	NOTICE of Appearance filed by Attorney Leslie Feldman-Rumpler for Appellee Arthur Burgess. [07-2312] (MM)
	* * * * *
6/2/08	CERTIFICATE of Service regarding Compliant Certificate of Serive [*sic*] for Appellee's Brief filed by Attorney Leslie Feldman-Rumpler for Appellee Arthur Burgess. [07-2312] (MM)
	* * * * *
6/2/08	BRIEF filed by Appellee Arthur Burgess. Length: 38 pages, 8,235 words. Copies: 10. Certificate of service dated 05/02/2008. Reply brief due 07/01/2008 for Appellant United States. [07-2312] (MM)

DATE	PROCEEDINGS
	* * * * *
7/1/08	REPLY BRIEF filed by Appellant US. Length: 17 pages, 4,559 words. Copies: 11. Certificate of service (mailed) dated 07/01/2008. [07-2312] (RL)
	* * * * *
7/29/08	SUR REPLY BRIEF filed by Appellees Arthur Burgess and Martin O'Brien.[1] Length: 12 pages. Copies: 9. Certificate of service dated 07/24/2008. [07-2312] (MM)
	* * * * *
7/29/08	Case argued. Panel: Boudin Appellate Judge, Dyk Appellate Judge, Dominguez U.S. District Judge Arguing Person Information Updated for: Leslie Feldman-Rumpler arguing for Appellee Arthur Burgess; Arguing Person Information Updated for: James Francis Lang arguing for Appellant United States; Arguing Person Information Updated for: Timothy Patrick O'Connell arguing for Appellee Martin O'Brien. [07-2312] (LM)
	* * * * *

[1] The text of this docket entry is not accurate. The sur-reply brief was filed by Appellee O'Brien only.

DATE	PROCEEDINGS
9/23/08	OPINION issued by Michael Boudin, Appellate Judge; Timothy Belcher Dyk, Appellate Judge and Daniel R. Dominguez, U.S. District Judge. Published. [07-2312] (MM)
9/23/08	JUDGMENT entered by Michael Boudin, Appellate Judge; Timothy Belcher Dyk, Appellate Judge and Daniel R. Dominguez, U.S. District Judge. 07-2312 Affirmed [07-2312] (MM)
9/24/08	MOTION filed by Appellant US to extend time to file petition for rehearing/rehearing en banc. Certificate of service dated 09/24/2008. [07-2312] (MM)
10/2/08	ORDER entered by Michael Boudin, Appellate Judge; Timothy Belcher Dyk, Appellate Judge and Daniel R. Dominguez, U.S. District Judge granting motion to extend time to file petition for rehearing filed by Appellant US. Petition for rehearing due 11/21/2008.. [07-2312] (MM)
11/17/08	MOTION filed by Appellant US to extend time to file petition for rehearing up to and including December 23, 2008. Certificate of service dated 11/17/2008. [07-2312] (MM)
11/21/08	ORDER entered by Michael Boudin, Appellate Judge; granting motion to extend

DATE	PROCEEDINGS
	time to file petition for rehearing filed by Appellant US. Petition for rehearing due 12/29/2008. [07-2312] (MM)
12/29/08	PETITION filed by Appellant US for rehearing en banc. Certificate of service dated 12/29/2008. [07-2312] (MM)
	* * * * *
1/26/09	ORDER entered by Sandra L. Lynch, Chief Appellate Judge; Juan R. Torruella, Appellate Judge; Michael Boudin, Appellate Judge; Kermit V. Lipez, Appellate Judge; Daniel R. Dominguez, U.S. District Judge; Timothy Belcher Dyk, Appellate Judge and Jeffrey R. Howard, Appellate Judge denying petition for rehearing en banc filed by Appellant US. [07-2312] (MM)
	* * * * *
4/20/09	U.S. SUPREME COURT ORDER filed. The application for an extension of time within which to file a petition for writ of certiorari has been extended to and including 05/26/2009. [07-2312] (MM)
	* * * * *
5/18/09	U.S. SUPREME COURT ORDER filed. The application for an extension of time

DATE	PROCEEDINGS
	within which to file a petition for writ of certiorari has been extended to and including 06/25/2009. [07-2312] (MM)
	* * * * *
6/25/09	U.S. SUPREME COURT NOTICE filed regarding Petition for Writ of Certiorari. 06/23/2009, 08-1569. [07-2312] (MM)
	* * * * *
10/2/09	U.S. SUPREME COURT ORDER filed. Granting Repsondent's [*sic*] Motion to Proceed In Forma Pauperis and Petition for Certiorari is granted. [07-2312] (MM)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Docket No. 1:05-cr-10183-MLW

UNITED STATES OF AMERICA

v.

DENNIS QUIRK, MARTIN O'BRIEN, ARTHUR BURGESS, JASON OWENS, AND PATRICK LACEY

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
7/20/05	9	INDICTMENT as to Dennis Quirk (1) count(s) 1, 2, 3, 5, Martin O'Brien (2) count(s) 1, 2, 3, Arthur Burgess (3) count(s) 1, 2, 3, 5, Jason Owens (4) count(s) 1, 4. (Gawlik, Cathy) (Entered: 07/21/2005)
		* * * * *
4/12/06	85	FIRST SUPERSEDING INDICTMENT as to Dennis Quirk (1) count(s) 1s, 2s, 3s,

DATE	DOCKET NUMBER	PROCEEDINGS
		5s, Martin O'Brien (2) count(s) 1s, 2s, 3s, Arthur Burgess (3) count(s) 1s, 2s, 3s, 5s, Jason Owens (4) count(s) 1s, 4s, Patrick Lacey (5) count(s) 1, 2. (Gawlik, Cathy) (Entered: 04/13/2006)
		* * * * *
2/21/07	157	SECOND SUPERSEDING INDICTMENT as to Dennis Quirk (1) count(s) 1ss-2ss, 3ss, 4ss, 6ss, Martin O'Brien (2) count(s) 1ss-2ss, 3ss, 4ss, Arthur Burgess (3) count(s) 1ss-2ss, 3ss, 4ss, 6ss, Jason Owens (4) count(s) 1ss, 5ss, Patrick Lacey (5) count(s) 1s-2s. (Smith3, Dianne) (Entered: 02/21/2007)
		* * * * *
3/2/07	168	Proposed Jury Instructions by USA as to Dennis Quirk, Martin O'Brien, Arthur Burgess (Feeley, Timothy) (Entered: 03/02/2007)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/2/07	173	TRIAL BRIEF by USA as to Patrick Lacey, Dennis Quirk, Martin O'Brien, Arthur Burgess, Jason Owens (Richardson, Robert) (Entered: 03/02/2007)
		* * * * *
3/9/07	185	Proposed Jury Instructions by Martin O'Brien (O'Connell, Timothy) (Entered: 03/09/2007)
		* * * * *
3/12/07	189	MOTION to Strike *portions of count three* as to Dennis Quirk, Martin O'Brien, Arthur Burgessby Dennis Quirk. (Weinstein, Elliot) (Entered: 03/12/2007)
		* * * * *
3/16/07	197	Proposed Jury Instructions by Arthur Burgess (Feldman-Rumpler, Leslie) (Entered: 03/16/2007)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/22/07	204	RESPONSE to Motion by USA as to Dennis Quirk, Martin O'Brien, Arthur Burgess re 189 MOTION to Strike *Portions of Count Three* (Feeley, Timothy) (Entered: 03/22/2007)
	* * * * *	
3/29/07	221	Supplemental RESPONSE to Motion by USA as to Dennis Quirk, Martin O'Brien, Arthur Burgess re 189 MOTION to Strike *Portions of Count Three* (Feeley, Timothy) (Entered: 03/29/2007)
	* * * * *	
4/2/07	237	Clerk's Notes for proceedings held before Judge Mark L. Wolf: Change of Plea Hearing as to Dennis Quirk, Martin O'Brien, Arthur Burgess held on 4/2/2007, Jury Trial as to Dennis Quirk, Martin O'Brien, Arthur Burgess held on 4/2/2007, Plea entered by Martin O'Brien (2) Guilty Count 1ss-2ss, 3ss

DATE	DOCKET NUMBER	PROCEEDINGS
		and Arthur Burgess (3) Guilty Count 1ss-2ss, 3ss, 4ss[2], 6ss and Dennis Quirk (1) Guilty Count 1ss-2ss, 3ss, 4ss[2], 6ss. (Court Reporter Romanow.) (O'Leary, Dennis) (Entered: 04/03/2007)
		* * * * *
5/25/07	246	AFFIDAVIT of Michael W. Ennis by USA as to Dennis Quirk, Martin O'Brien, Arthur Burgess (Feeley, Timothy) (Entered: 05/25/2007)
5/25/07	247	AFFIDAVIT of Eric M. Toole by USA as to Dennis Quirk, Martin O'Brien, Arthur Burgess (bound affidavit with exhibits) (Boyce, Kathy) (Entered: 05/29/2007)
		* * * * *
6/20/07	257	Clerk's Notes for proceedings held before Judge Mark

[2] The text of this docket entry is not accurate. Defendants Burgess and Quirk did not plead guilty to Count 4 of the Second Superseding Indictment; rather, that count was dismissed on the government's oral motion. See Dkt. 237; pp. 42, 56, *infra*.

DATE	DOCKET NUMBER	PROCEEDINGS
		L. Wolf: Sentencing held on 6/20/2007 for Martin O'Brien (2), Count(s) 1ss-2ss, 78 months custody to be served concurrently, 36 months supervised release $200 special assessment fee.; Count(s) 3ss, 102 months custody to be served conecutively [*sic*] to the sentence imposed on counts 1ss and 2ss, 36 months supervised release to be served concurrently and $100 special assessment fee.; Arthur Burgess (3), Count(s) 1ss-2ss, 180 months custody to be served concurently [*sic*] with sentence imposed on count 6, 36 months supervised release and $200.00 special assessment fee; Count(s) 3ss, 84 months custody to be served cnsecutively [*sic*] to the sentence imposed on counts 12 & 6, 36 months supervised release and $100 special assessment fee.; Count(s) 6ss, 180 months custody to be served

DATE	DOCKET NUMBER	PROCEEDINGS
		concurently [*sic*] with sentence imposed on counts 1&2, 36 months supervised release and $100.00 special assessment fee. (Court Reporter Romanow.) (O'Leary, Dennis) (Entered: 06/20/2007)
		* * * * *
6/23/07	260	Judge Mark L. Wolf : ORDER entered. JUDGMENT as to Martin O'Brien (2), Count(s) 1ss-2ss, 78 months custody to be served concurrently, 36 months supervised release $200 special assessment fee.; Count(s) 3ss, 102 months custody to be served consecutively to the sentence imposed on counts 1ss and 2ss, 36 months supervised release to be served concurrently and $100 special assessment fee. (O'Leary, Dennis) (Entered: 06/25/2007)
6/23/07	261	Judge Mark L. Wolf: ORDER entered. JUDGMENT as to Arthur Burgess (3),

DATE	DOCKET NUMBER	PROCEEDINGS
		Count(s) 1ss-2ss, 180 months custody to be served concurrently with sentence imposed on count 6, 36 months supervised release and $200.00 special assessment fee; Count(s) 3ss, 84 months custody to be served consecutively to the sentence imposed on counts 12 & 6, 36 months supervised release and $100 special assessment fee.; Count(s) 6ss, 180 months custody to be served concurrently with sentence imposed on counts 1&2, 36 months supervised release and $100.00 special assessment fee (O'Leary, Dennis) (Entered: 06/25/2007)
		* * * * *
7/12/07	263	TRANSCRIPT of Motion Hearing as to Patrick Lacey, Dennis Quirk, Martin O'Brien, Arthur Burgess, Jason Owens held on March 29, 2007 before Judge Wolf. Court Reporter: Richard H. Romanow. The original

DATE	DOCKET NUMBER	PROCEEDINGS
		transcripts are maintained by the Clerk's Office. Copies may be obtained by contacting the court reporter at 617/737-0370 or the Clerk's Office. (Scalfani, Deborah) (Entered: 07/12/2007)
7/12/07	265	TRANSCRIPT of Change of Plea as to Dennis Quirk, Martin O'Brien, Arthur Burgess held on April 2, 2007 before Judge Wolf. Court Reporter: Richard H. Romanow. The original transcripts are maintained by the Clerk's Office. Copies may be obtained by contacting the court reporter at 617/737-0370 or the Clerk's Office. (Scalfani, Deborah) (Entered: 07/12/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/19/07	267	NOTICE OF APPEAL by USA as to Martin O'Brien, Arthur Burgess NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov/clerks/transcript.htm MUST be completed and submitted to the Court of Appeals. Appeal Record due by 8/8/2007. (Feeley, Timothy) (Entered: 07/19/2007)
		* * * * *
8/24/07	274	Certified and Transmitted Record on Appeal as to Martin O'Brien, Arthur Burgess to US Court of Appeals re 267 Notice of Appeal, (Attachments: # 1 # 2) (Ramos, Jeanette) (Entered: 08/24/2007)
		* * * * *
11/9/07	283	TRANSCRIPT of Sentencing Hearing as to Martin

DATE	DOCKET NUMBER	PROCEEDINGS
		O'Brien, Arthur Burgess held on June 20, 2007 before Judge Wolf. Court Reporter: Richard H. Romanow. The original transcripts are maintained by the Clerk's Office. Copies may be obtained by contacting the court reporter at 617/737-0370 or the Clerk's Office. (Scalfani, Deborah) (Entered: 11/09/2007)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Docket No. 1:05-cr-10183-MLW

UNITED STATES OF AMERICA

v.

DENNIS QUIRK, MARTIN O'BRIEN, ARTHUR BURGESS, JASON OWENS, AND PATRICK LACEY

[Feb. 21, 2007]

SECOND SUPERSEDING INDICTMENT

Violations:

18 U.S.C. § 1951
Conspiracy to Affect Commerce by Robbery

18 U.S.C. § 1951
Attempt to Affect Commerce by Robbery

18 U.S.C. § 924(c)
Possession of Firearms in Furtherance of a Violent Crime

18 U.S.C. §§ 924(c)(1)(A) and 924(c)(1)(B)(ii)
Possession of Machinegun in Furtherance of a Violent Crime

18 U.S.C. § 922(g)(1)
Felon in Possession of Firearms And Ammunition

* * * * *

COUNT THREE: 18 U.S.C. § 924(c) - Use, Carrying and Possession of Firearms During and in Relation to, and in Furtherance of, a Crime of Violence

The Grand Jury further charges that:

On or about June 16, 2005, at Boston, Everett, Malden, and elsewhere in the District of Massachusetts,

DENNIS QUIRK,
MARTIN O'BRIEN, and
ARTHUR BURGESS,

defendants herein, did use and carry firearms, to wit, a Chinese, model AK47S, 7.62 x 39 mm rifle bearing serial number 8706180, a Cobray, model CM-11/Nine, 9 mm pistol bearing serial number 94-0014612, and a Sig Sauer, model P230, 9 mm pistol bearing serial number S146460, during and in relation to a crime of violence, to wit, an attempt to affect commerce by robbery, as charged in Count Two of this Indictment, and did knowingly possess said firearms in furtherance of said crime of violence.

All in violation of Title 18 United States Code, Sections 924(c) and 2.

COUNT FOUR: 18 U.S.C. § 924(c)(1)(A) and 924(c)(1)(B)(ii) - Use, Carrying and Possession of a Machinegun During and in Relation to, and in Furtherance of, a Crime of Violence

The Grand Jury further charges that:

On or about June 16, 2005, at Boston, Everett, Malden and elsewhere in the District of Massachusetts,

DENNIS QUIRK,
MARTIN O'BRIEN, and
ARTHUR BURGESS,

defendants herein, did use and carry a machinegun, to wit, a Cobray, model CM-11/Nine, 9 mm pistol bearing serial number 94-0014612, during and in relation to a crime of violence, to wit, an attempt to affect commerce by robbery, as charged in Count Two of this Indictment, and did knowingly possess said machinegun in furtherance of said crime of violence.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A), 924(c)(1)(B)(ii), and 2.

* * * * *

A TRUE BILL

/s/ WILLIAM SULLIVAN
FOREPERSON OF THE
GRAND JURY

/s/ ROBERT E. RICHARDSON
ROBERT E. RICHARDSON
ASSISTANT U.S. ATTORNEY

DISTRICT OF MASSACHUSETTS: 2/21/07, Returned into the District Court by Grand Jurors and filed.

/s/ ILLEGIBLE
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Docket No. 1:05-cr-10183-MLW

UNITED STATES OF AMERICA, PLAINTIFF

v.

DENNIS QUIRK AND MARTIN O'BRIEN AND
ARTHUR BURGESS, DEFENDANTS

Thursday, Mar. 29, 2007

TRANSCRIPT OF PROCEEDINGS, BEFORE THE HONORABLE MARK L. WOLF, UNITED STATES DISTRICT CHIEF JUDGE

Final Pretrial Conference

APPEARANCES:

FOR THE PLAINTIFF:

BY: Timothy Q. Feeley, Esq.
Robert E. Richardson, Esq.
United States Attorney's Office
John Joseph Moakley Federal Courthouse
1 Courthouse Way, Suite 9200
Boston, Massachusetts 02210
(617) 748-3100
Email: Timothy.feeley@usdoj.gov
For the United States of America

FOR THE DEFENDANTS:

BY: Elliot M. Weinstein, Esq.
83 Atlantic Avenue
Boston, Massachusetts 02110
(617) 367-9334
Email: Elliot@eweinsteinlaw.com
For Dennis Quirk

BY: Timothy P. O'Connell, Esq.
Charlestown Navy Yard
C-8 Shipway Place
Charlestown, Massachusetts 02129
(617) 242-4806
Email: Tpocsr@verizon.net
For Martin O'Brien

BY: Leslie Feldman-Rumpler, Esq.
Law Office of Feldman-Rumpler
101 Tremont Street, Suite 708
Boston, Massachusetts 02108
(617) 728-9944
Email: Lfeldmanr@aol.com
For Arthur Burgess

* * * * *

[48]

* * * * *

[THE COURT:] All right. And then I think the other major issue is the defendant's motion to strike Count 3 that relates to the weapon that's alleged to be a machine gun in Count 4. As I understand it, there are two issues. One is this question of whether the weapon was a machine gun, an element of the offense or a sentencing factor, and, two, whether the government must

prove, either to a jury or to a court, that the defendant knew it was a machine gun? Am I right so far?

MR. FEELEY: Yes, your Honor.

THE COURT: I gave you extra time, because you agreed to it, to file your briefs and what that does is limit the amount of time I have to study these things, which is a problem, but here's my tentative thinking, and you can address this, please.

First, I'm inclined to keep both Counts 3 and 4. [49] I don't perceive a double jeopardy problem because Count 4 has an element that's not required to prove Count 3 and that is that both counts involve the same weapon. but to prove a violation of Count 4, the government will have to prove that the weapon is a machine gun. So under the ***Blackberger*** test, there's a different element, the defendant could logically be found guilty of Count 3, but not Count 4. So I don't see it as a double jeopardy problem at the moment.

I would use a special verdict form with regard to Count 3 because Count 3 charges several weapons and it would be important for a variety of reasons, including sentencing possibly, but certainly for double jeopardy grounds to know which defendant has been found guilty on Count 3 because of possession of which weapon? And the government pointed out the First Circuit's decision in ***Melvin***, 27 F. 3rd 710 at 716, that encourages the use of special verdicts or special questions in a situation like this.

One thing's not clear to me from the government's submissions. Is it seeking to hold the defendants responsible or to convict them on the basis only of whatever weapons they personally possessed or is the gov-

ernment relying on one or more theories of vicarious liability such as aiding and abetting or ***Pinkerton*** [50] liability?

MR. FEELEY: Your Honor, the proposed jury instructions that the government has filed on this issue include a proposed ***Pinkerton*** charge on the 924(c) liability. The First Circuit, in the ***Shea*** case, actually, joined other circuits in finding that ***Pinkerton*** is an appropriate liability or culpability theory with respect to 924(c). The government is also going to be proposing to the Court, and hopefully we'll be drafting it this weekend, an aiding and abetting instruction as well. The actual mental states necessary for accomplice liability under the two theories are different. Aiding and abetting on a 924(c) charge requires that the aider and abetter know, to a practical certainty, that a firearm would be used, whereas under ***Pinkerton***, it's actually reasonable [*sic*] foreseeable.

THE COURT: It has to be within the scope of the agreement or is reasonably foreseeable.

MR. FEELEY: Right. So we intend to present—to ask the Court to instruct on both alternative means of—

THE COURT: You might want to think about that over time, because if there are two standards, it could conceivably get confused.

MR. FEELEY: We were worried about confusion, [51] your Honor, that's why we didn't put it in the first one.

THE COURT: All right. I mean, you should give me the alternatives you might ultimately ask for, but I think the important thing for present purposes is that you're not seeking to hold the defendants responsible only for

the weapons they personally possessed, allegedly. If you convict them on Count 1, you want the jury to hold them responsible also under a ***Pinkerton*** theory with regard to both Count 3 and Count 4, the machine gun count?

MR. FEELEY: Yes, your Honor. Although I believe the—I think the 924(c) counts are actually tied to Count 2, the attempted robbery, as opposed to the conspiracy, which is Count 1. We limited it just to—

THE COURT: Okay, I'm sorry. I forgot the Hobbs Act has its own—now, wait a minute. Say this again?

MR. FEELEY: We have tied the 924(c) charges not to the conspiracy in Count 1, we have tied them to the attempted Hobbs Act robbery in Count 2, the actual June 16th event. So what would have to be found is a conspiracy—for the ***Pinkerton*** instruction, a conspiracy with respect to the attempted armored car [52] robbery. Even though it's uncharged, that armored car robbery is one of the objects of the greater conspiracy.

THE COURT: Count 1 was what?

MR. FEELEY: Was the conspiracy count that begins prior to June 16th and concludes on that date. Count 2 is a substantive claim. It's an attempt claim. It's a substantive attempt claim under the Hobbs Act.

THE COURT: I'd have to look at it. It doesn't allege that they conspired to attempt to rob?

MR. FEELEY: No, there's no specific conspiracy for the attempt, your Honor, the attempt is part of the general conspiracy in Count 1. But under the law, the government would be entitled to a ***Pinkerton*** charge even if the conspiracy was not charged. But here, in

fact, we do have a general conspiracy. But the proposed jury instructions on the ***Pinkerton*** charge, your Honor, are a little bit—and I won't say confusing, but they're a little bit unwieldy because of the amount of language that needs to be included, because the 924(c) counts charged alternatively "used and carried during and in relation to" and "possessed in furtherance of." So it gets a little wordy, your Honor, but we believe that we have presented it to the Court appropriately.

THE COURT: When you give me these [53] instructions—and I haven't read the jury instructions yet, you should tell me, for example, what the authority is for the proposition that you get a ***Pinkerton*** charge even if you didn't allege a conspiracy in the indictment, although you do have a conspiracy in Count 1.

MR. FEELEY: I actually—I may be able to give you that authority right now, your Honor.

THE COURT: Okay.

MR. FEELEY: I may be able to. (Looks.) I will have to look in my office, your Honor.

THE COURT: Okay. Then—well, let me just go on with this a bit and see what needs to be done on this issue.

(Pause.)

THE COURT: Count 4 is in there and, as I said, at the moment, I don't perceive a double jeopardy problem.

MR. FEELEY: If I could address that briefly, your Honor?

THE COURT: Okay.

MR. FEELEY: I actually believe ***Blackberger*** requires that the Court find an element in each count that is not included in the other count. I actually think what we have with Count 3 and Count 4 is a lesser [54] included offense situation, your Honor.

THE COURT: Right. Okay. I think—right. Can't you charge the lesser included offenses?

MR. FEELEY: Yes, you can, your Honor, although you can't go to judgment on both. It's something that needs to be worked out before judgment. I don't think there's anything inappropriate because the Court instructs on lesser included offenses, I'm sure, with some regularity. But if I could, your Honor, preface my remarks here.

This is a somewhat complicated issue. There is a split in the circuits on whether or not the type of weapon is—or the type of weapon is a sentencing factor or an element, although the great weight of the authority is it's a sentencing factor. Our thinking on this, your Honor, has evolved since we superseded and added Count 4. We were trying to at least deal with the possibility that the split in the circuits would go against the government on this, so we added Count 4, and then thereafter realized that, in any event, if it is a sentencing factor, we will not have sufficient evidence to establish knowledge, because it seems the two issues that the Court framed are essentially combined. If it's a sentencing factor, no specific knowledge of the weapon characteristics are needed, but if it is an element, [55] then we would have to prove that the defendants knew it was a machine gun.

So we added Count 4 in order to deal with the ***Harris*** decision from the Sixth Circuit and then later realized that that addition may be meaningless because if ***Harris***

is the law, we're going to lose on the knowledge, because we will not have sufficient evidence to establish that they knew.

So if this court ultimately concludes that the type of weapon is a sentencing factor, the government would, on its own, if the Court does not well—at least, would seek leave to dismiss Count 4, because the crime would be adequately charged in Count 3 if we had special questions that the Court is—has indicated it would be inclined to provide.

If we keep Count 4, your Honor, the only—if we keep Count 4 and this court finds that it's an element, then we would dismiss or ask to have Count 4 dismissed because we won't be able to prove it. If we keep Count 4 and this court has decided it's a sentencing factor, we would only ask that the mens rea instruction on the machine gun be that they don't have to know it's a machine gun, all they have to do is find that it is a machine gun.

THE COURT: Okay. If it's a sentencing factor [56] and I'm just using them in an advisory capacity?

MR. FEELEY: Yes. Yes. And we don't really object to the jury finding whether it's a machine gun or not a machine gun, but if it's a sentencing factor, that actually is not a required finding by the jury. If it's not a sentencing factor, we're not going to be able to sustain our burden, your Honor. That's why we are actually now proposing that Count 4 not be included in the indictment on which the defendants are tried, whatever you decide.

THE COURT: Do I have to decide this before trial?

MR. FEELEY: Well, your Honor, I think it does need to be decided because certainly, I guess, our open-

ings would—if we thought it was an element—well, if we thought it was an element, your Honor, or if the Court ruled it was an element, we would not go forward on Count 4.

THE COURT: All right. So you wouldn't be asking, at this point, for an interlocutory appeal, you just wouldn't be going forward on Count 4?

MR. FEELEY: That's right.

THE COURT: All right. This is very helpful clarification because this is work that needs to be done, and I'll try to figure this out. I think it would [57] be premature to argue this right now. I need to read I mean—I thought that the implications of ***Castillo*** are what I have to wrestle with. Is that right?

MR. FEELEY: Well, our argument, your Honor, is ***Castillo*** became obsolete when Congress wrote the new 924(c) and there is substantial Circuit Court law and there is the ***Harris*** decision from the Supreme Court that deals with the current version of 924(c). And we say that the changes in the statute actually address the reasons why the Supreme Court decided ***Castillo*** the way it did and addressed it in such a way that the majority of the courts that have looked at the issue have found type of weapon and/or factors like brandishing to be sentencing factors, including the Supreme Court in ***Harris***, but that was limited not to the type of weapon, but that was limited to a brandishing, which is also part of the 924(c) structure.

THE COURT: But is it in the previous—

MR. FEELEY: It's (a) and (b), your Honor.

THE COURT: And brandishing is in (a).

MR. FEELEY: And type of weapon is in B. But both of them are separate from what we say is the defined crime, your Honor.

THE COURT: Give me your argument on this, why is it a sentencing factor? And what is there, one case, [58] it's Sandoval, that's found that a machine gun is a sentencing factor.

MR. FEELEY: Your Honor, ***Sandoval***, but I believe also ***Gamboa*** was, I believe, also type of weapon. We actually listed them in our trial brief, your Honor. And some of the cases are limited to brandishing, some are limited or deal with type of weapon, because it doesn't necessarily have to be a machine gun, you could have a sawed-off shotgun or you could have a—at one point you could have a semiautomatic assault weapon. So I believe there's a couple of cases that actually deal with the type of weapon, your Honor.

The government's argument starts with ***Castillo*** and looks at why the Supreme Court decided ***Castillo*** the way it did and looks at the structure of 924(c) at that time and then looks at the new version of 924(c). And our argument, your Honor, is that the new version actually answers or addresses the reasons why the Supreme Court in ***Castillo*** felt that it was an element, a separate crime as opposed to a sentencing factor, because Congress split up the sentence and used an introductory paragraph defining the crime and then two subsections below dealing with—actually more than two, because it also deals with successive convictions, it deals with [59] aspects that we suggest are sentencing factors. And the only court to find that the post ***Castillo***, or the 924(c) statute, the 1998 statute, the only court to find that it states separate crimes for the various listed matters

below the chart—the defined first paragraph is the ***Harris*** case from the Sixth Circuit, and to the contrary, there is substantial authority saying that it is sentencing factors.

And it's the structure of the statute that really is the strength of the Government's argument. It's the structure of the statute that has led most Courts of Appeals to find that way. And it's the structure of the statute, at least with respect to brandishing, that caused the Supreme Court in ***Harris*** to decide—with five members of the court concurring, that brandishing was a sentencing factor under the new 924(c), your Honor.

But if the government has a preference at the end of the day, your Honor, it's going to be—regardless of what the Court rules on either the element or the sentencing factor, whichever it is, the government's preference would be to go forward without Count 4. If it's a sentencing factor, Count 4 would only essentially be an advisory determination on whether it's a machine gun and if it's an element, your Honor, the government [60] will concede that it will not have sufficient evidence to establish the mens rea to support that element.

THE COURT: All right. That's extremely helpful.

Do the defendants want to be heard on this?

MR. WEINSTEIN: I'm sure we all do. Let me try to start the discussion. And the government really has made it easier to focus on what result we're all looking for here.

We've argued, I believe, that the right conclusion is that a machine gun is an element of the offense and if that's so, then Count 4 goes and it sounds like the gov-

ernment is saying that Count 4 should go regardless. So then we'd be looking at—

THE COURT: But not in the way your client wants it to go. They want—

MR. WEINSTEIN: Right. Then we'll talk about what do you do with the machine gun that remains as alleged in Count 3 and whether you view that particular weapon as an element of the offense charged in Count 3? And I still say that it is an element of the offense and I still press that specific mens rea attaches when machine gun is an element of 924(c).

THE COURT: I think the government's agreeing with that. Right?

[61]

MR. FEELEY: Yes, your Honor, we do agree with it if it is an element.

THE COURT: Right.

MR. WEINSTEIN: Well, then if that's where we end, I'm not sure what we have left?

THE COURT: Well, what you have left is whether it's an element or a sentencing factor? The government's position is it's a sentencing factor and when it's a sentencing factor, the government is not obliged to prove to the Court, to get the 30-year sentence, that the defendant knew it was a machine gun.

MR. WEINSTEIN: Well, I don't think that's correct.

THE COURT: Well, that's their argument.

MR. WEINSTEIN: Well, your Honor, I think if it's a sentencing factor, that that's exactly what the govern-

ment has to prove, but to the Court, to the preponderance of evidence, as opposed to a jury beyond a reasonable doubt. That's what I think we're left with the government's position.

THE COURT: And what supports your view?

MR. WEINSTEIN: By saying that the Court has to know the nature of what the weapon is when it has to reach that sentencing factor.

THE COURT: The defendant has to know.

[62]

MR. WEINSTEIN: The Court has to conclude that the defendant knew. And I'd start back with ***Castillo*** and look to factors that the Supreme Court relied upon and one of the significant ones was the length of sentence involved in regard to the offense. There were five factors that ***Castillo***, the ***Castillo*** court set forth and the fifth was the length of sentence.

Distinguishing the seven-year bit for a conviction of a brandishing offense, and that's what several of these cases look factually concerned with, brandishing, as opposed to a machine gun, which then carries that 30-to-life sentence. I don't think the answer to the inquiry is if the sentence is imposed within the statutory limits, sort of an ***Apprendi*** and ***Booker***-type of analysis and whether it has to be pled and proven? I think there's something distinct here, in the 924(c) case with a machine gun. And the distinction—and I take it from ***Harris VI***, is that it's that length of sentence that is so critical.

If it's an element, which I don't think the government is now pressing for, or if you conclude it's an element,

the government is saying "We can't prove it." So whether you go down Road A or Road B, Count 4 looks like it's going to disappear. But if we're left with a machine gun in Count 3, then there's a question [63] of who decides what with respect to first the nature of the weapon and then knowledge with respect to that? And I'd submit that what the jury would decide with Count 3 as pled, as returned by this grand jury, is that there was a firearm.

And so if it's a firearm at the time of sentencing, the Court, you, then have to make a determination with respect to the nature of that firearm. And the government would have to prove, if it's looking for the sentencing enhancement, the 30-to-life boost, that weapon, that Cobray is, in fact, automatic and that the defendants knew it was automatic. That would be the position that I would press if we end up just dealing with the nature of the firearm at the time of sentencing, if there's a conviction.

THE COURT: All right. But if I find that proving it's a machine gun is an element and Count 4 is dismissed, I wouldn't, if the defendants are convicted on Count 3 of possessing that Cobray, be determining whether or not it was a machine gun because that's an element not a sentencing factor.

MR. WEINSTEIN: That means you'd be ruling against the mens rea claim that I would be pressing.

THE COURT: Well, no, I'm saying you would win [64] because it's an element not a sentencing factor.

MR. WEINSTEIN: Well, if you say exclusively an element, then absolutely. That's correct.

THE COURT: Do any of the other defendants want to be heard on this?

MR. O'CONNELL: Just briefly, Judge. This is like grabbing smoke sometimes. And in this case what confused me was the superseding indictment, Count 4, they said "Knowingly possessed a machine gun." So in my mind is you've tried to say "special verdict" and all I said, "Well, in 3, if we've got a Cobray, whether it's joint venture, ***Pinkerton***, or whatever reason, we're subject to 5 years or whatever it is on top and then it would be an extra, an extra mens rea, an element of the crime with a machine gun. Now they're saying "We can't prove it that you knew it was a machine gun" and we're giving them that it is a machine gun because we really don't know if they can prove it.

So I'm a little bit confused here because in the last four weeks, they filed a superseding indictment on the hope that maybe somebody else would go to the Supreme Court—and, by the way, there was a case that came down two days ago, it's on a 922(o) from the U.S. Court of Appeals, ***Nieves***, ***Castano***, Judge, and they went in pretty heavily on—Judge Lynch, Judge Howard, and [65] the third name escapes me, heavy on the possession of a machine gun with the knowledge necessary. Now, that's a 922(o), but that's mentioned in 924(c), too, Judge.

THE COURT: Wait a minute. There was a case two days ago?

MR. O'CONNELL: It was a case two days ago to come down from the Court of Appeals, N-I-E—

THE COURT: Well, we'll have to get that.

MS. FELDMAN-RUMPLER: Your Honor, I have it.

MR. O'CONNELL: We have it here, Judge. Fine. In any event, it was a different—922(o), but by the same token—and the language is very clear that it had to be knowledge. And I'm just saying, Judge—I'm in agreement with Mr. Weinstein. I'm still perplexed as to how they could indict someone and then tell you, "Well, we can't prove that they knew it and we want you to go to 3 and give them 30 to life"?

THE COURT: They' re not.

MR. O'CONNELL: Well, I'm not sure they're not, Judge. I'm confused on that.

THE COURT: Well, let me ask you this. Mr. Feeley, if I decide this is an element and Count 4 is therefore dismissed at your request because you know that you can't provide sufficient proof on an essential part of that element, are you going to be coming back if [66] the defendants are convicted on Count 3 with regard to the Cobray and saying that the Court should find that their sentence should be 30 years?

MR. FEELEY: Your Honor, at sentencing we would preserve our right to essentially appeal your element ruling by coming to sentencing and saying, "Your Honor, we understand your ruling pretrial, but we ask you to find that it's a sentencing factor and we ask you to find that it was a machine gun," and you would say "No, I've ruled," and then we would have an appellate right, your Honor.

THE COURT: And all of this would have to spin out, but you would say that that appeal is not barred by the double jeopardy clause because you wouldn't have to

have another trial if the First Circuit found that it was a sentencing factor, not an element, they would only remand it for additional sentencing proceedings, you wouldn't need another trial?

MR. FEELEY: That is correct, your Honor. We wouldn't be expecting the court to deal with it as a sentencing factor if you had already ruled, but we would have to keep our objection before the Court for appellate purposes.

THE COURT: And I would understand that and not think that you were being obstreperous, for [67] the first time ever.

All right. So that helps a lot. One of the things that I need to really focus on probably before your openings is whether this is an element or not? So I'm going to work on that. * * *

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 1:05-cr-10183-MLW

UNITED STATES OF AMERICA

v.

DENNIS QUIRK AND MARTIN O'BRIEN AND
ARTHUR BURGESS

Monday, Apr. 2, 2007

Plea Hearing

---

* * * * *

[22]

* * * * *

THE COURT: Okay. Well, let's get to that point.

All right. As I told you earlier this morning, with regard to the 18 United States Code Section [23] 924(c)(1)(b)(2) question, I've decided that proving a machine gun, as required by that statutory provision, is an element of the offense, not a sentencing factor. Essentially I agree with the reasoning of the Sixth Circuit in ***Harris***, 397 F. 3rd 404. I respectfully disagree with the reasoning of the Seventh Circuit in ***Sandoval***, 241 F. 3rd 549, which found that the Section 924(c)(1)(b)(1) requirement of a semiautomatic assault weapon was a sentencing factor.

My analysis is not inconsistent with the cases which find that the factual issues identified in Section 924(c)(1)(a) are sentencing factors. Those are cases like ***Pounds***, 230 F. 3rd at 1370 and 1319, in which the Eleventh Circuit found that the discharge of a weapon was a sentencing factor, or ***Barton***, 257 F. 3rd 443, a Fifth Circuit case finding that brandishing is a sentencing factor.

As the Supreme Court explained in ***Castillo***, 530 U.S. 120 at 126, the way a gun is used, such as brandishing, is a traditional sentencing factor. The Supreme Court also stated, in ***Castillo***, however, that the nature of the weapon, including the distinction between a pistol and a machine gun, is usually a substantive matter and the nature of the weapon is therefore traditionally an element of the offense.

[24]

My analysis is consistent with this traditional treatment of the nature of the weapon as an element of the offense, but does not rely exclusively on it. ***Castillo*** was decided in 2000, however, it interpreted a pre1998 version of Section 924(c) which had "brandishing" and "the nature of the weapon in the same subsection. The 1998 amendment puts factors relating to the way the weapon was used in Section 924(c)(1)(a) and issues concerning the nature of the weapon" in Section 924(c)(1)(b). ***Castillo*** explains the considerations for analysis in deciding whether a machine gun is an element of the offense or a sentencing factor. I note that the Sixth Circuit in ***Harris*** considered all of the factors discussed in ***Castillo***, the Seventh Circuit in ***Sandoval*** did not.

Pursuant to ***Castillo***, I've looked first at the language of the statute. It does not clearly resolve the issue of whether a machine gun—that proving a machine gun is

an element of the offense or a sentencing factor. The structure of the statute favors the conclusion that "machine gun" is an element, not a sentencing factor. If it were only a sentencing factor, it could and should have been listed under Section 924(c)(1)(a) with the traditional sentencing factors like "brandishing." Instead, including "machine gun" in [25] Section 924(c)(1)(b) manifests an understanding of the traditional distinction between the way a weapon is used and the nature of the weapon itself.

As the Supreme Court stated in ***Castillo***, "Congress legislates against a backdrop of traditional treatment of certain categories of important facts." (Phone rings.) "The manner in which a crime is carried out, such as whether the weapon was brandished, is a traditional sentencing factor. However, the distinction between weapons, for example, between pistols and machine guns, is, according to the Supreme Court, typically substantive because it relates to the heart of the crime at issue. Asking a jury to decide if the defendant used or carried a machine gun would merely complicate a trial or risk unfairness." Indeed, in this case, the government has been willing to have the issue of whether the weapon dispute was a machine gun put to the jury even if it is a sentencing factor.

I assume, however, that a special verdict form could address the problem of uncertainty discussed in ***Castillo***. When as here the defendants are charged with using several weapons, the First Circuit approved the use of such a special verdict form with interrogatories in ***Melvin***, 27 F. 3rd 710 at 716. However, as in ***Castillo***, at Page 131, the length and severity of the [26] added mandatory sentence, 30 years if it's a machine gun as op-

posed to 5 years, weighs in favor of finding that a machine gun is an element of the offense. The rule of lenity, as the Supreme Court explains, reinforces this conclusion.

Therefore, I find that "machine gun" is an element of the offense. The government acknowledges that if "machine gun" is an element of the offense, it must prove a defendant knew it was a machine gun. The government acknowledges it cannot prove that required knowledge. Therefore, the Government has previously told me it would request that I dismiss Count 4 if I find that a machine gun is an element of the offense rather than a sentencing factor, and I will grant such a motion momentarily.

Once again, I note that if the First Circuit or the—I guess I'll stop right there.

In the circumstances, does the government request that Count 4 be dismissed and will it accept the plea to the remaining—

MR. FEELEY: Yes, it does. Your Honor, we'll file an electronic version of a dismissal requesting leave of court on the basis of—

THE COURT: Well—and, in fact, we've been through this. I'll accept the oral motion. It can be [27] memorialized in writing. But I'm allowing the motion now. So Count 4 is dismissed with regard to each of the three defendants. * * *

* * * * *

[37]

* * * * *

THE COURT: Mr. Richardson and Mr. Feeley, what are the maximum possible penalties for each of the counts and what are the applicable mandatory minimums as you understand them?

MR. RICHARDSON: Your Honor, as to each of Count 1 charging conspiracy to violate the Hobbs Act and Count 2 charging attempt to violate the Hobbs Act, the maximum possible penalties are 20 years in prison, a 250,000 dollar fine, three years of supervised release, and a mandatory 100 dollar special assessment.

As to Count 4, which charges each of these defendants with—

THE COURT: Count 4 or Count 3?

MR. RICHARDSON: I'm sorry. Count 3, which charges each of these defendants with a violation of Title 18, United States Code, Section 924(c), in light of the Court's ruling, the applicable minimum mandatory [38] term of imprisonment is 7 years and the maximum possible term of imprisonment is life. The maximum possible fine is 250,000 dollars, the maximum possible term of supervised release is 5 years, and there's a mandatory 100 dollar special assessment.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 1:05-cr-10183-MLW

UNITED STATES OF AMERICA

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

Wednesday, June 20, 2007

Sentencing Hearing

APPEARANCES:

FOR THE PLAINTIFF:

BY: Timothy Q. Feeley, Esq.
Robert E. Richardson, Esq.
United States Attorney's Office
John Joseph Moakley Federal Courthouse
1 Courthouse Way, Suite 9200
Boston, Massachusetts 02210
(617) 748-3100
Email: Timothy.feeley@usdoj.gov
For the United States of America

FOR THE DEFENDANTS:

BY: Timothy P. O'Connell, Esq.
Charlestown Navy Yard
C-8 Shipway Place

Charlestown, Massachusetts 02129
(617) 242-4806
Email: Tpocsr@verizon.net
For Martin O'Brien

BY: Leslie Feldman-Rumpler, Esq.
Law Office of Feldman-Rumpler
101 Tremont Street, Suite 708
Boston, Massachusetts 02108
(617) 728-9944
Email: Lfeldmanr@aol.com
For Arthur Burgess

* * * * *

[8]

[The Court:] The government objects, in effect, to the ruling I made previously as to whether the type of weapon was an element of the offense or a sentencing factor. And I assume the government is seeking to be especially careful to preserve that issue for appeal. But it's my present intention, unless the government wants to be heard further, to deny Objection 1 for the reasons that I stated on, I believe it was, April 2nd. Okay? That's Objection 1 in both PSRs.

* * * * *

[11]

* * * * *

Objection 4 says: "The defendant objects to the term 'In fact, fired fully automatically when test fired at the FBI laboratory' with regard to Paragraph 20. The affidavit provided by the Government states that the Cobray pistol, when test fired, operated only in automatic

mode. Further, the government has not provided any information that the Cobray was modified."

Is the—what's the point of this objection?

MR. O'CONNELL: Judge, there was no automatic mode on the Cobray, to go back there. From their reasoning of it, it's semantics. From my reasoning, Judge, in the event there was something, in anticipation of some other hearing to come up after today, it would be important for us to be able to tell you that there was no automatic mode on that, Judge, and that falls into our knowledge of it and that they couldn't possibly have known whether, in fact, it did fire automatically and whether it was made to do that during the testing. So—

THE COURT: Well, does it relate to [12] knowledge? Are you arguing that it's not an automatic weapon for the purposes of the law or just that your client didn't know it?

MR. O'CONNELL: Well, I think that the government conceded that my client and none of the others knew it. I think as far as the law goes, the issue is was it an automatic weapon when they had it? And I realize I'm splitting hairs, judge, but—

THE COURT: Well, I have to rule on this objection at some point, so I have to understand it.

MR. O'CONNELL: I understand that, Judge. But what I'm saying to you, Judge, is if this weapon—maybe by analogy, I can tell you. If this weapon was taken out of an armory, let's say, Judge, and it had an off switch, an automatic mode switch, and a fully-automatic mode switch, I think my argument would be a lot different. In this case, there was only a safety and an on switch. So if this thing fires automatically and no one knew it, we

certainly—there's a possibility that it was a cheap stamped gun made out of—and I'm trying to think of Rochester, New York or someplace, Judge. This could have been done during testing, Judge, is what I'm saying. There's plastic used in them. They melt down. They wear down. So it was important for us to say that he didn't know it and [13] we don't know whether it was or not.

THE COURT: But the fact that it's an automatic weapon doesn't just relate to the departure issue, what else does it relate to? Does it relate to anything else?

MR. RICHARDSON: No, your Honor, that's the main issue. It relates for our appeal, but in terms of this sentencing, it really is one of several factors rolled into the upward departure motion.

THE COURT: You say it relates more to appeal?

MR. RICHARDSON: Well, our argument on appeal is it is a machine gun and, as your Honor knows, our argument is that their knowledge doesn't matter. But I'm saying for these purposes, for sentencing here today, I think the only relevance is it's one of several factors and—

THE COURT: Well, I'll reserve judgment that on—Number 4, too.

* * * * *

[32]

* * * * *

[MR. RICHARDSON:] Third, is sort of the intimidation factor. There was a barrel extender attached to the firearm out there on the street. It looks sort of like a

silencer. In fact, that's not what it is. It simply was a barrel extender. But it certainly gave the appearance frankly of something that looked sort of like a machine gun, which gets us to the 4, which is that, in fact, it turns out that it was a machine gun. Now—

THE COURT: What was a machine gun?

MR. RICHARDSON: I'm sorry, your Honor?

THE COURT: The Cobray?

MR. RICHARDSON: The Cobray. And I would concede that there is nothing—you can't look at the face of that firearm, there's nothing on it that says "I am a machine gun" or "I fire in fully automatic mode," but the fact of the matter is that it does. And whether or not the defendants knew that it was—and actually what we conceded was that we could not prove beyond a reasonable doubt that they knew what it was, but whether or not they knew what it was, it does fire fully [33] automatically.

And I think in a circumstance like this, there are all sorts of guideline provisions that apply whether or not a defendant knows what he or she has, such as the stolen firearm enhancement of two levels. It doesn't matter whether the defendant knows that a firearm is stolen, you take your chances when you possess a firearm in connection with a Federal crime. In this case, frankly whether they do? It's almost more dangerous if they didn't know and they started spraying bullets around without realizing what they have. But in any event, that's one of a number of other factors that takes this well out of the heartland of 924C cases.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 1:05-cr-10183-MLW

UNITED STATES OF AMERICA

v.

DENNIS QUIRK, MARTIN O'BRIEN, ARTHUR BURGESS

Filed: Mar. 22, 2007

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE PORTIONS OF COUNT THREE

The government hereby responds to the defendants' motion (the "defendants") to strike portions of Count Three of the Second Superseding Indictment. [D. 189]. Count Three charges defendants Dennis Quirk, Martin O'Brien, and Arthur Burgess with using, carrying, or possessing firearms during and in relation to, or in furtherance of, a crime of violence, to wit, the attempted Hobbs Act robbery charged in Count Two of the Second Superseding Indictment, in violation of 18 U.S.C. § 924(c). Three firearms are charged in Count Three as being used, carried or possessed by the three defendants: (1) an AK-47 semi-automatic rifle; (2) a Cobray 9mm pistol (the "MAC-11); and (3) a Sig Sauer 9mm pistol.

The defendant's motion to strike the MAC-11 from Count Three is based on the inclusion of the same wea-

pon in Count Four, which charges the defendants with the same crime, that is, a violation of 18 U.S.C. § 924(c). Count Four, however, charges that the MAC-11 is a machinegun. If the firearm possessed by a person convicted of a violation of § 924(c) is a machinegun, the statute requires imposition of a term of imprisonment of not less than 30 years. 18 U.S.C. §924(c)(1)(B)(ii). If the firearm possessed by a person convicted of a violation of § 924(c) is not a machinegun, the statute requires imposition of a term of imprisonment of not less than five years, not less than seven years if the firearm is brandished, and not less than ten years if the firearm is discharged. 18 U.S.C. § 924(c)(1)(A)(i), (ii), and (iii). A machinegun meets the statutory definition of a firearm. 18 U.S.C. § 921(a)(3).

Residing just below the surface of defendants' motion is the real dispute between the parties. Defendants claim, consistent with their proposed jury instructions, that the type of weapon, that is, a machinegun, is an element of a § 924(c) crime, and must be charged and proven to the jury beyond a reasonable doubt. [Defs' Brief, at 1]. The defendants rely on the Sixth Circuit's decision in *United States v. Harris*, 397 F.3d 404 (6th Cir. 2005). The government on the other hand, as argued in its trial brief, and consistent with its proposed jury instructions, takes the position that the type of weapon in a §924(c) offense is a sentencing factor that need not be charged or proven to a jury beyond a reasonable doubt. The government further takes the position, disputed by defendants by way of their proposed jury instructions, that as a sentencing factor, neither the jury nor this Court need find that the defendants knew the MAC-11 was a machinegun in order for the enhanced sentence to be imposed. *See United States v.*

Harris, 959 F.2d 246, 313 (D.C. Cir. 1992); *Brantley v. United States*, 68 F.3d 1283, 1290 (11th Cir. 1995); *United States v. Shea*, 150 F.3d 44, 52 (1st Cir. 1998) *overruled on other grounds by Castillo v. United States*, 530 U.S. 120 (2000); *United States v. Nava-Sotelo*, 354 F.3d 1202, 1206 (10th Cir. 2003); *United States v. Gamboa*, 439 F.3d 796, 812 (8th Cir. 2006). With that as background, the government addresses defendants' motion to strike as follows.

If the Court agrees with the government that the type of weapon is a sentencing factor, and the government need not prove that the defendants knew the MAC-11 was a machingegun [*sic*] in order for the defendants to be sentenced to an enhanced sentence based on that factor, the government will dismiss Count Four and proceed only under Count Three (of the two § 924(c) counts), with special questions for the jury to determine the firearm(s) used, carried or possessed by each defendant. *See United States v. Melvin*, 27 F.3d 710, 716 (1st Cir. 1994) (endorsing use of either special interrogatories or separate counts for the "ambiguous verdict problem" in a § 924(c) case, and "should there be more than one conviction, merging those convictions after the trial").

If the Court agrees with defendants that not only is the type of weapon an element of a § 924(c) charge, but also that the government must prove that the defendants knew the MAC-11 was a machinegun, the government will represent to the Court that it cannot sustain its burden of showing such a *mens rea*, and ask this Court, based on its legal rulings and the government's concession, to dismiss Count Four so that the govern-

ment can seek approval from the Solicitor General to file an interlocutory appeal under 18 U.S.C. § 3731.

Unless the government pursues an interlocutory appeal before jeopardy attaches, its ability to have an adverse determination on this important issue reviewed would be lost forever. The difference between sentencing a defendant under the machinegun enhancement of § 924(c), or merely under the brandishing enhancement of the statute, is 23 years of mandatory incarceration. The importance of this issue is clear, and appellate courts will ultimately have the last word. On a direct appeal after conviction, the defendants would be able to obtain appellate review of any 30-year sentence that was imposed by the Court without proof that they knew the MAC-11 was a machinegun. Likewise, the government should be able to obtain appellate review of any decision that, by requiring the jury to find such a *mens rea*, will preclude the opportunity to seek such a sentence. If this Court rules against the government in this case, but appellate review is not available, any later ruling to the contrary by the First Circuit or the Supreme Court would not be applicable against the defendants. Such a result would not be in the public interest.

Thus, regardless of this Court's decision on the sentencing factor/element issue, defendants' motion to strike the MAC-11 from Count Three should be denied.

Respectfully submitted,

MICHAEL J. SULLIVAN
United States Attorney

By: /s/ TIMOTHY Q. FEELEY
TIMOTHY Q FEELEY
ROBERT E. RICHARDSON
TIMOTHY Q. FEELEY
Assistant U.S. Attorneys
(617) 748-3172

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 1:05-cr-10183-MLW

UNITED STATES OF AMERICA

v.

DENNIS QUIRK, MARTIN O'BRIEN, ARTHUR BURGESS

Filed: Mar. 29, 2007

GOVERNMENT'S FURTHER RESPONSE TO DEFENDANTS' MOTION TO STRIKE PORTIONS OF COUNT THREE

The government hereby further responds to the defendants' motion (the "defendants") to strike portions of Count Three of the Second Superseding Indictment. [D. 189]. As will be explained at today's pretrial conference, the government has reflected further on the contents of its initial response with respect to the type of weapon issue under 18 U.S.C. § 924(c). That further reflection, and additional consultation within this office, has caused the government to reconsider its argument that the double jeopardy clause would preclude appellate review of a determination by this Court that the type of weapon is an element of a § 924(c) offense. In fact, the government believes that an effective appeal of any such ruling by this Court could take place after trial if any defendants are convicted on Count Three of the

Second Superceding Indictment. Thus, even if this Court finds adversely to the government on this issue, no issue of an interlocutory appeal will arise.

Respectfully submitted,

MICHAEL J. SULLIVAN
United States Attorney

By: /s/ TIMOTHY Q. FEELEY
TIMOTHY Q. FEELEY
ROBERT E. RICHARDSON
TIMOTHY Q. FEELEY
Assistant U.S. Attorneys
(617) 748-3172

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Docket No. 1:05-cr-10183-MLW

UNITED STATES OF AMERICA, PLAINTIFF

v.

DENNIS QUIRK, ARTHUR BURGESS AND
MARTIN O'BRIEN, DEFENDANTS

CLERK'S NOTES

4/2/07 Court decides that the issue of whether the gun is a machine gun is an element of the offense and not a sentencing factor. * * * Court gives its reasoning for its decision regarding why a machine gun is an element of the offense and not a sentencing factor. Government orally moves to dismiss count IV. Court allows the motion and dismisses count IV as to each of the defendants. * * *

4/2/07 Government summarizes the evidence it would have presented had the case gone to trial. Defendants Burgess and Quirk plead guilty to counts 1, 2, 3 and 6. Defendant O'Brien pleads guilty to counts 1-3. Court accepts the defendants pleas of guilty and directs the clerk to enter the same. * * *

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
NOV 25 2009
OFFICE OF THE CLERK

No. 08-1569

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BENJAMIN J. HORWICH
Assistant to the Solicitor General
SANGITA K. RAO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TC+TA
592826

QUESTION PRESENTED

Section 924(c)(1) of Title 18 of the United States Code provides for a series of escalating mandatory minimum sentences depending on the manner in which the basic crime (*viz.*, using or carrying a firearm during and in relation to an underlying offense, or possessing the firearm in furtherance of that offense) is carried out. The question presented is whether the sentence enhancement to a 30-year minimum when the firearm is a machinegun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by a preponderance of the evidence.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 8
Argument:
Section 924(c)(1)(B), which increases the minimum penalty for using, carrying, or possessing a firearm in connection with a crime of violence when the firearm is a machinegun, states sentencing factors rather than offense elements 12
A. Section 924(c)(1)'s language and structure show that firearm type is a sentencing factor 14
1. The language of Section 924(c)(1) states that firearm type is a sentencing factor 14
2. The structure of Section 924(c)(1) shows that firearm type is a sentencing factor 16
B. Secondary factors that this Court has considered also favor treating firearm type as a sentencing factor 21
1. Enhanced minimum sentences for particularly dangerous firearms have often turned on judicial fact-finding at sentencing 22
2. The lengths of the sentences provided by Section 924(c)(1)(B) do not suggest that the triggering facts are elements 24
3. The relevant legislative history is silent, but the nature and context of the 1998 overhaul of Section 924(c)(1) favor treating firearm type as a sentencing factor 29

Table of Contents—Continued: Page

C. This Court should respect Congress's sound policy choice to treat firearm type as a sentencing factor 31
D. This Court's decision in *Castillo* does not control the interpretation of the current version of Section 924(c)(1) 35
Conclusion 39
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 13, 15, 19, 21, 28, 21
Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 10, 24
Bailey v. *United States*, 516 U.S. 137 (1995) 29
Boyle v. *United States*, 129 S. Ct. 2237 (2009) 21
Caminetti v. *United States*, 242 U.S. 470 (1917) 16
Castillo v. *United States*, 530 U.S. 120 (2000) ..... *passim*
Deal v. *United States*, 508 U.S. 129 (1993) 14
Dean v. *United States*, 129 S. Ct. 1849 (2009) ..... *passim*
Harmelin v. *Michigan*, 501 U.S. 957 (1991) 22
Harris v. *United States*, 536 U.S. 545 (2002) ..... *passim*
Jones v. *United States*, 526 U.S. 227 (1999) ..... *passim*
Liparota v. *United States*, 471 U.S. 419 (1985) 12
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 30
Monge v. *California*, 524 U.S. 721 (1998) 19
Morales v. *TWA*, 504 U.S. 374 (1992) 30, 37
Muscarello v. *United States*, 524 U.S. 125 (1998) 39
Rummel v. *Estelle*, 445 U.S. 263 (1980) 22

Cases—Continued: Page

Smith v. *United States*, 508 U.S. 223 (1993) 32, 38
Staples v. *United States*, 511 U.S. 600 (1994) 12, 18, 34
United States v. *Abbott*, 574 F.3d 203 (3d Cir. 2009), petition for cert. pending, No. 09-479 (filed Oct. 19, 2009) 15
United States v. *Avery*, 295 F.3d 1158 (10th Cir.), cert. denied, 537 U.S. 1024 (2002) 13
United States v. *Booker*, 543 U.S. 220 (2005) 27
United States v. *Cassell*, 530 F.3d 1009 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1038 (2009) 13
United States v. *Chandia*, 514 F.3d 365 (4th Cir. 2008) 27
United States v. *Ciszkowski*, 492 F.3d 1264 (11th Cir. 2007) 13, 33
United States v. *Cristobal*, 293 F.3d 134 (4th Cir.), cert. denied, 537 U.S. 963 (2002) 19
United States v. *Davis*, 306 F.3d 398 (6th Cir. 2002), cert. denied, 537 U.S. 1208 (2003) 19
United States v. *Dixon*, 273 F.3d 636 (5th Cir. 2001), cert. denied, 537 U.S. 829 (2002) 13
United States v. *Duerson*, 25 F.3d 376 (6th Cir 1984) ... 32
United States v. *Freed*, 401 U.S. 601 (1971) 32
United States v. *Gamboa*, 439 F.3d 796 (8th Cir.), cert. denied, 549 U.S. 1042 (2006) 13, 34
United States v. *Harris*, 397 F.3d 404 (6th Cir. 2005) ... 13
United States v. *Harrison*, 272 F.3d 220 (4th Cir. 2001), cert. denied, 537 U.S. 839 (2002) 13, 21, 37
United States v. *Hatcher*, 501 F.3d 931 (8th Cir. 2007), cert. denied, 128 S. Ct. 1133 (2008) 19

Cases—Continued: Page

United States v. *Hoosier*, 442 F.3d 939 (6th Cir. 2006) . . . 34
United States v. *Madrid*, 222 Fed. Appx. 721 (10th Cir. 2007) 19
United States v. *Mejia*, 545 F.3d 179 (2d Cir. 2008) 19
United States v. *Rivera-Rivera*, 555 F.3d 277 (1st Cir.), cert. denied, 130 S. Ct. 344 (2009) 19, 20
United States v. *Ron Pair Enters.*, 489 U.S. 235 (1989) 16
United States v. *Sandoval*, 241 F.3d 549 (7th Cir.), cert. denied, 534 U.S. 1057 (2001) 13
United States v. *Smith*, 223 F.3d 554 (7th Cir. 2000), cert. denied, 536 U.S. 957 (2002) 28
United States v. *Smith*, 296 F.3d 344 (5th Cir.), cert. denied, 537 U.S. 1012 (2002), and 538 U.S. 935 (2003) 19
United States v. *Tidwell*, 521 F.3d 236 (3d Cir.), cert. denied, 129 S. Ct. 762 (2008) 28
United States v. *Williams*, 65 Fed. Appx. 819 (3d Cir.), cert. denied, 540 U.S. 932 (2003) 19
United States v. *Woodruff*, 296 F.3d 1041 (11th Cir. 2002), cert. denied, 537 U.S. 1114 (2003) 19
Williams v. *Taylor*, 529 U.S. 420 (2000) 14

Statutes and guidelines:

Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 3
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1303 27
Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(C)-(E), 100 Stat. 457 3

Statutes and guidelines—Continued: Page

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 233 3
Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, Tit. XI, Subtit. A, 108 Stat. 1996:
§ 110102(c)(2), 108 Stat. 1998 31
§ 110105(2), 108 Stat. 2000 31
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 2022 ... 27
18 U.S.C. 2 6
18 U.S.C. 921(a)(3) 18
18 U.S.C. 921(a)(3)(A) 18
18 U.S.C. 921(a)(3)(C) 18
18 U.S.C. 921(a)(3)(D) 18
18 U.S.C. 921(a)(5)-(8) 18
18 U.S.C. 921(a)(23) 18
18 U.S.C. 922(g) 29
18 U.S.C. 922(g)(1) 22, 23
18 U.S.C. 924(a)(2) 29
18 U.S.C. 924(c) ..... *passim*
18 U.S.C. 924(c)(1) (Supp. V 1993) ..... *passim*
18 U.S.C. 924(c)(1) ..... *passim*
18 U.S.C. 924(c)(1)(A) ..... *passim*
18 U.S.C. 924(c)(1)(A)(i) 3, 4, 28
18 U.S.C. 924(c)(1)(A)(ii) 7, 9, 10, 17, 19, 20
18 U.S.C. 924(c)(1)(A)(ii)-(iii) 3, 4
18 U.S.C. 924(c)(1)(A)(iii) 10, 19, 20, 25
18 U.S.C. 924(c)(1)(B) ..... *passim*

Statutes and guidelines—Continued: Page

18 U.S.C. 924(c)(1)(B)(i) ..... *passim*
18 U.S.C. 924(c)(1)(B)(i)-(ii) 3
18 U.S.C. 924(c)(1)(B)(ii) ..... *passim*
18 U.S.C. 924(c)(1)(C) 16
18 U.S.C. 924(c)(1)(C)(i) 4, 10, 11, 19, 20, 28
18 U.S.C. 924(c)(1)(C)(i)-(ii) 3
18 U.S.C. 924(c)(1)(C)(ii) 4, 10, 19, 20
18 U.S.C. 924(c)(1)(D)(i) 10, 19
18 U.S.C. 924(c)(1)(D)(ii) 7, 10, 19
18 U.S.C. 924(e) 2
18 U.S.C. 924(e)(1) 29
18 U.S.C. 1201(a) 26
18 U.S.C. 1201(g)(1) 26
18 U.S.C. 1951 2
18 U.S.C. 2241(c) 28
18 U.S.C. 2251(e) 28
18 U.S.C. 2252(b)(1) 28
18 U.S.C. 2252(b)(2) 29
18 U.S.C. 2252A(b)(1) 29
18 U.S.C. 2252A(b)(2) 29
18 U.S.C. 2332b(g)(5)(A) 26
18 U.S.C. 2332b(g)(5)(B) 27
18 U.S.C. 2332b(g)(5)(B)(i)-(iv) 26
18 U.S.C. 2339B 27
21 U.S.C. 841(b)(1)(A) 29
21 U.S.C. 848(a) 28, 29
21 U.S.C. 848(b) 28

Statutes and guidelines—Continued: Page

21 U.S.C. 848(c) 28
21 U.S.C. 960(b)(1) 29
26 U.S.C. 5845(b) 18
United States Sentencing Guidelines:
§ 2K2.1 (1998) 23
§ 2K2.1 comment. (statutory provisions) (1998) 23
§ 2K2.1(a)(5) (1998) 23
§ 2K2.1(a)(7) (1998) 23
§ 2K2.1(b)(3) (1998) 23
§ 2M5.2(a) (1998) 23
§ 3A1.4 ..... 26, 27
§ 5K2.6 (1998) 23, 24
§ 5K2.17 (1998) 24
App. C:
Amend. 526 27
Amend. 539 27
Amend. 565 27

Miscellaneous:

Memorandum from Jeannie Rhee, Deputy Assistant Att'y Gen., Dep't of Justice, *Whether the Ten-Year Minimum Sentence in 18 U.S.C. § 924(c)(1)(B)(i) Applies to Semiautomatic Assault Weapons* (Nov. 24, 2009) 31

In the Supreme Court of the United States

No. 08-1569

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 542 F.3d 921.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2008. A petition for rehearing was denied on January 26, 2009 (Pet. App. 19a-20a). On April 15, 2009, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including May 26, 2009. On May 13, 2009, Justice Souter further extended the time to June 25, 2009, and the petition was filed on June 23, 2009. The petition for a writ of certiorari was granted on September 30, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Following guilty pleas in the United States District Court for the District of Massachusetts, respondents were convicted of conspiring to affect commerce by robbery, in violation of 18 U.S.C. 1951; attempting to affect commerce by robbery, in violation of 18 U.S.C. 1951; and using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c)(1). Respondent Burgess additionally was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). O'Brien Judgment 1; Burgess Judgment 1. Respondent O'Brien was sentenced to 180 months of imprisonment, including a 102-month consecutive term on the Section 924(c)(1) conviction, to be followed by three years of supervised release. Gov't C.A. App. 238. Burgess was sentenced as an armed career criminal (see 18 U.S.C. 924(e)) to 264 months of imprisonment, including an 84-month consecutive term on the 18 U.S.C. 924(c)(1) conviction, to be followed by three years of supervised release. Gov't C.A. App. 237, 240. The government asked the district court to increase the sentences under Section 924(c)(1)(B)(ii) because the firearm used, carried, and possessed was a machinegun. The district court refused to impose the higher mandatory minimum term of imprisonment, and the government appealed. The court of appeals affirmed. Pet. App. 1a-13a.

1. Since its enactment in 1968, 18 U.S.C. 924(c) has made it a distinct criminal offense for an individual to

use or carry a firearm during the commission of certain federal crimes. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 233. In 1986, Congress provided for higher fixed mandatory sentences when the firearm has certain characteristics (*e.g.*, is a machinegun or has a silencer). See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(C)-(E), 100 Stat. 457. In *Castillo* v. *United States*, 530 U.S. 120 (2000), this Court interpreted that former version of Section 924(c)(1), which is reproduced at App., *infra*, 3a. *Castillo* held, as a matter of statutory construction, that the type of firearm was not a sentencing factor for the judge to decide by a preponderance of the evidence, but rather an element of a "separate crime." 530 U.S. at 123-131. The Court therefore held that "the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt." *Id.* at 123.

In 1998, Congress overhauled Section 924(c)(1).[1] Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469. The new provision describes the offense in the principal paragraph of Subparagraph (A): using or carrying a firearm during and in relation to certain crimes, or possessing a firearm in furtherance of such crimes. Clause (A)(i) sets a baseline mandatory minimum sentence for that offense. The provision then separately lists in Clauses (A)(ii)-(iii), (B)(i)-(ii) and (C)(i)-(ii) circumstances affecting how the defendant is to "be sentenced." Under the current version of the statute, Congress did not limit the sentencing judge to a defined maximum (as the pre-1998 statute did in prescribing

[1] Although decided after enactment of the current version of Section 924(c)(1), *Castillo* interpreted the pre-1998 version. See *Castillo*, 530 U.S. at 121, 125.

determinate sentences). The new statute instead provides an escalating series of mandatory *minimum* sentences. For any violation of the current statute, the implied maximum term is life imprisonment. See, *e.g.*, 18 U.S.C. 924(c)(1)(A)(i) (requiring simply a sentence "of not less than 5 years" for the offense).

Under the terms of the new statute, enhanced penalties apply when the firearm is "brandished" or "discharged," 18 U.S.C. 924(c)(1)(A)(ii)-(iii), which this Court recognizes as sentencing factors. See *Harris* v. *United States*, 536 U.S. 545, 552-556 (2002) (brandishing); *Dean* v. *United States*, 129 S. Ct. 1849, 1854 (2009) (discharging). Enhanced penalties also apply when the firearm is of a particularly dangerous type, 18 U.S.C. 924(c)(1)(B). For example, Clause (B)(i) specifies a ten-year minimum term of imprisonment "[i]f the firearm possessed by a person convicted of a violation of [Section 924(c)] * * * is a * * * short-barreled shotgun." Similarly, and most relevant here, Clause (B)(ii) specifies a 30-year minimum term of imprisonment "[i]f the firearm * * * is a machinegun." Recidivists are also subject to enhanced penalties: second or subsequent convictions under Section 924(c)(1) carry minimum sentences of either 25 years of imprisonment or life imprisonment (if the firearm is a machinegun). 18 U.S.C. 924(c)(1)(C)(i) and (ii).

2. Respondents, along with co-defendants Dennis Quirk, Jason Owens, and Patrick Lacey, conspired and attempted to rob a Loomis-Fargo armored car as it made a scheduled delivery of cash to a bank located on a busy street in the North End of Boston, Massachusetts. Respondents and Quirk hid inside a minivan—O'Brien armed with a semi-automatic Sig-Sauer pistol, Burgess with a semi-automatic AK-47 rifle, and Quirk

with a fully automatic Cobray "MAC-11" machine pistol. The targeted armored car carried almost $2 million in cash, and contrary to usual practice, it had two guards instead of one. As one guard unloaded boxes of coins from the opened rear door of the armored car, the other guard stood near a bag containing about $275,000 in cash that had been placed on the pavement. When one of the robbers exited the minivan with a weapon pointed at the closest guard, that guard dropped to the pavement as ordered, but the second guard used the truck as cover to run down the sidewalk to a nearby restaurant. The robbers' failure to control the second guard caused them to abort the robbery and flee the scene without taking any money. Co-defendant Lacey helped respondents and Quirk get away, and co-defendant Owens provided his apartment as a rendezvous for the robbers. Gov't C.A. App. 176-179, 236; Gov't Supp. C.A. App. 6-9, 49-53; J.A. 49.

Authorities quickly located several of the conspirators based on tips and other information. The evening of the attempted robbery, officers executed a search warrant at Owens' residence and found the three firearms, each loaded: the semi-automatic Sig-Sauer with eight rounds of ammunition, the semi-automatic AK-47 with two banana clips holding 50 rounds, and the fully automatic Cobray with a loaded magazine and a spare holding 48 rounds (some of them hollow point bullets, designed to spread out upon impact to maximize injury). Each gun had a round of ammunition in the chamber. Law enforcement officers also recovered bulletproof vests from the residence. Gov't C.A. App. 179-180; Gov't Supp. C.A. App. 9, 52-53.

3. On July 20, 2005, a grand jury sitting in the District of Massachusetts returned an indictment charging

respondents, along with some of the co-conspirators, with various robbery and gun charges. Indictment 1-8. As relevant here, Count 3 charged respondents with using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c) and 18 U.S.C. 2. Count 3 listed the three firearms—the Cobray, the AK-47, and the Sig-Sauer—but did not identify the Cobray, which functioned in fully automatic mode, as a machinegun. Indictment 5; Gov't Supp. C.A. App. 9, 53. On February 21, 2007, a grand jury returned a second superseding indictment adding a Count 4, which charged respondents, based on the presence of the Cobray pistol, with using and carrying a machinegun during and in relation to, and possessing a machinegun in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and (B)(ii) and 18 U.S.C. 2. J.A. 20-21. The Cobray pistol remained charged in Count 3 without an assertion that it was a machinegun. J.A. 20.

Respondents moved to strike the reference to the Cobray pistol from Count 3 on the theory that the particular type of firearm is an element of a Section 924(c)(1) offense and therefore properly charged only in a separate count, as it was in Count 4. Docket No. 189. The government responded that Section 924(c)(1)(B)'s firearm-type provisions are sentencing factors for the court to determine under a preponderance standard in the event of a conviction on the offense described in Section 924(c)(1)(A). Because the Cobray was appropriately charged in Count 3, the government argued that Count 4 was not required by Section 924(c)(1) and should be dismissed. J.A. 51. At the same time, the government conceded that if the type of firearm is an offense element, the government could not prove this element be-

yond a reasonable doubt and the court should dismiss Count 4 on this basis. In particular, the government said it could not prove, as it assumed would be necessary, that respondents knew of the Cobray pistol's fully automatic action. J.A. 51-52.

The district court held that the government was required to charge and prove to the jury that the Cobray pistol was a machinegun to trigger the mandatory minimum sentence under Section 924(c)(1)(B)(ii). Pet. App. 15a-18a. Accordingly, the government asked the district court to dismiss Count 4, consistent with its prior concession. *Id.* at 4a; J.A. 42. Upon the dismissal of that count, respondents pleaded guilty to the remaining charges against them, including Count 3. Each respondent acknowledged that he was liable for the three firearms listed in Count 3, including the Cobray pistol. Gov't C.A. App. 172-173.

At sentencing, the district court found, without opposition, that respondents had brandished a firearm while violating Section 924(c), calling for a mandatory minimum sentence of 84 months to be served consecutively to the sentences imposed on the other counts, pursuant to Section 924(c)(1)(A)(ii) and (D)(ii). Gov't C.A. App. 188-189, 209-211, 236-238. The court again rejected the government's argument that respondents were instead subject to a 30-year mandatory minimum consecutive sentence under Section 924(c)(1)(B)(ii) based on their possession of a machinegun. J.A. 45. The district court sentenced O'Brien to 180 months of imprisonment, including a consecutive 102-month term on the Section 924(c) charge. Gov't C.A. App. 238. As an armed career criminal, Burgess was sentenced to an aggregate 264 months of imprisonment, including a consecutive 84-month term on the Section 924(c) charge. *Id.* at 237.

4. The government appealed. A court of appeals held, "with some misgivings," that Section 924(c)(1) requires the characteristics of the firearm to be found "by the jury as an element of the crime." Pet. App. 1a-2a. The court observed that, "[r]ead in a vacuum, the language of [S]ection 924(c) indicates that the 'offense' (carrying a five year minimum sentence) is the carriage, use or possession of a firearm during a drug or violent felony—all elements for the jury," whereas the "type of firearm—which merely raised the mandatory minimum —pose[s] [a] sentencing issue[] to be resolved by the judge." *Id.* at 5a. The court further observed that such a reading "would comport with the statute's structure as well." *Ibid.* (citing *Harris*, 536 U.S. at 552-553). Nevertheless, the court concluded that this Court's decision in *Castillo*—which interpreted the earlier and different version of Section 924(c)(1)—was "close to binding" in the absence of "a clearer or more dramatic change in language or legislative history." *Id.* at 10a. The court thus held that firearm characteristics are offense elements that must be decided by the jury, although it "concede[d] that, if we were writing on a clean slate, the statute's language would be a powerful argument" for the contrary conclusion. *Ibid.*

SUMMARY OF ARGUMENT

The type of firearm that a defendant uses, carries, or possesses in connection with a federal crime of violence or drug trafficking crime, in violation of 18 U.S.C. 924(c)(1), is a sentencing factor to be decided by the judge by a preponderance of the evidence, rather than an element of a distinct offense that must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt.

A. The language of Section 924(c)(1) dictates that firearm type is a sentencing factor. Section 924(c)(1)(B) provides that the firearm-type enhancements apply to "a person *convicted of a violation* of this subsection." 18 U.S.C. 924(c)(1)(B) (emphasis added). "Convicted of" refers to a finding of guilt, which necessarily precedes sentencing. Because firearm type becomes relevant under the statutory scheme only after the defendant has been found guilty (*i.e.*, "convicted of a violation"), firearm type does not bear on whether the defendant should be "convicted of a violation." Firearm type is therefore a sentencing factor. That conclusion is reinforced by the language of Clauses (B)(i) and (B)(ii), which direct how certain defendants "shall be sentenced."

The structure of Section 924(c)(1) confirms that firearm type is a sentencing factor. The statute begins with a lengthy principal paragraph stating the elements of the offense, followed by subsections bearing on the appropriate sentence. As this Court observed in *Harris* v. *United States*, 536 U.S. 545 (2002), in construing this very statute, "[w]hen a statute has this sort of structure, we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors." *Id.* at 553. *Harris* concluded that Section 924(c)(1)(A)(ii), which increases the minimum sentence when the firearm is brandished, states a sentencing factor. The structural inference that firearm type is a sentencing factor is even stronger, because unlike the brandishing provision of Clause (A)(ii), the firearm-type provisions of Clauses (B)(i) and (ii) are not even in the same sentence or subparagraph as the offense-defining language.

The firearm-type provisions in Subparagraph (B) are surrounded by sentencing factors. Brandishing and dis-

charging in Clauses (A)(ii) and (iii) are sentencing factors. See *Harris*, 536 U.S. at 552-556; *Dean* v. *United States*, 129 S. Ct. 1849, 1854 (2009). Clauses (C)(i) and (ii) relate principally to recidivist sentencing, which is classically a sentencing factor. And Clauses (D)(i) and (ii) expressly pertain to sentencing by prohibiting the imposition of probation and providing for a consecutive sentence. That arrangement strongly suggests that the firearm types specified in Subparagraph (B) are also sentencing factors.

B. Section 924(c)(1)(B) lies at the intersection of two sentencing factor traditions. First, at the time of the 1998 adoption of the current version of Section 924(c)(1), the Sentencing Guidelines reflected a strong practice of treating firearm type as a factor for the judge's consideration at sentencing, especially in firearm-based offenses. Second, unlike provisions that increase the maximum level of punishment—which by tradition often were identified as offense elements, and since *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), must be so treated—mandatory minimum sentencing provisions have traditionally (and perhaps exclusively) been understood as sentencing factors. The mandatory minimum sentences for particularly dangerous firearms prescribed by Section 924(c)(1)(B) belong to both sentencing factor traditions.

The 30-year mandatory minimum sentence prescribed in Section 924(c)(1)(B)(ii) is lengthy, reflecting the enormous risk posed by machineguns. But that length is not a basis to conclude that firearm type is an offense element. The ten-year minimum sentence for brandishing is "precisely what one would expect to see in [a] provision[] meant to identify matters for the sentencing judge's consideration." *Harris*, 536 U.S. at 554.

Although longer, the 30-year enhancement plays a similar role. Congress has directed comparably lengthy enhancements based on judicial findings in cases involving comparably dangerous or heinous conduct—such as aggravated kidnapping, terrorism, and leadership of an organized drug trafficking enterprise. Moreover, numerous recidivist sentencing provisions—like Section 924(c)(1)(C)(i)—require comparably long sentences, even when the offenses involved are less dangerous. In any event, the severity of an enhanced mandatory minimum sentence could not overcome Congress's clear expression, through language and structure, of its intent to create a sentencing factor in Section 924(c)(1)(B)(ii).

C. Congress had sound policy reasons for treating firearm type as a sentencing factor. The particular firearms that trigger enhanced sentences—machineguns, silencers, sawed-off shotguns and rifles, bombs, grenades, missiles, mines, and the like—are some of the most dangerous and threatening weapons available. Treating firearm type as a sentencing factor ensures consistent application of the penalty enhancement reflecting this aggravated potential for destruction. At the same time, this treatment of an essentially technical determination simplifies guilt-stage proceedings without reducing the accuracy of fact-finding.

D. Contrary to the reasoning of the court of appeals, this Court's decision in *Castillo* v. *United States*, 530 U.S. 120, 123 (2000)—which construed an earlier and different version of Section 924(c)(1)—is not controlling here. Indeed, *Castillo* itself acknowledged that Section 924(c)(1) had been rewritten and restructured in a way that pointed to the sentencing factor interpretation. *Id.* at 125. The current version of Section 924(c)(1) adopts a mandatory-minimum scheme, provides for firearm-

type enhancements for "convicted" defendants, and structurally divides elements from sentencing considerations. All of those features were absent from the version construed in *Castillo*. The current version thus makes clear that firearm type is a sentencing factor.

ARGUMENT

SECTION 924(c)(1)(B), WHICH INCREASES THE MINIMUM PENALTY FOR USING, CARRYING, OR POSSESSING A FIREARM IN CONNECTION WITH A CRIME OF VIOLENCE WHEN THE FIREARM IS A MACHINEGUN, STATES SENTENCING FACTORS RATHER THAN OFFENSE ELEMENTS

The court of appeals held that, to obtain the enhanced minimum sentence when the firearm involved in a violation of 18 U.S.C. 924(c)(1)(A) is a machinegun, the government must allege the nature of the firearm in the indictment and prove it to a jury beyond a reasonable doubt. That holding is incorrect. The principal paragraph of Section 924(c)(1)(A) states all of the elements of a single federal crime, and Section 924(c)(1)(B), which provides for increased minimum sentences for various specific firearms, states sentencing factors bearing on how a "person convicted of" that crime "shall be sentenced."

Within broad constitutional limits, "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (brackets in original) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). When, as in this case, a particular fact in a statute increases a minimum sentence within the authorized range, the question whether that fact states an offense element or a sentencing factor is solely a question of

congressional intent. *Harris* v. *United States*, 536 U.S. 545, 552 (2002); *Castillo* v. *United States*, 530 U.S. 120, 123 (2000); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); see also *Jones* v. *United States*, 526 U.S. 227, 232-239 (1999). The answer to that question turns on the "language, structure, subject matter, context, and history" of the provision in question. *Almendarez-Torres*, 523 U.S. at 228.

Applying that approach, the majority of courts of appeals to consider the question have correctly held that firearm type is a sentencing factor that need not be charged in the indictment or submitted to a jury.[2] The First Circuit's reliance on *Castillo* to reach a contrary conclusion is misplaced. *Castillo* construed an earlier and quite different version of Section 924(c)(1). Unlike that former version of the statute, the current statute's provision for increased mandatory minimums within the authorized range, and its clear delineation of sentencing considerations separate from the elements of the offense, establish that the involvement of a machinegun as the firearm in a Section 924(c)(1) offense is a sentencing factor.

---

[2] See *United States* v. *Cassell*, 530 F.3d 1009, 1017 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1038 (2009); *United States* v. *Harrison*, 272 F.3d 220, 225-226 (4th Cir. 2001), cert. denied, 537 U.S. 839 (2002); *United States* v. *Sandoval*, 241 F.3d 549, 550-552 (7th Cir.), cert. denied, 534 U.S. 1057 (2001); *United States* v. *Gamboa*, 439 F.3d 796, 810-812 (8th Cir.), cert. denied, 549 U.S. 1042 (2006); *United States* v. *Avery*, 295 F.3d 1158, 1171-1172 (10th Cir.), cert. denied, 537 U.S. 1024 (2002); *United States* v. *Ciszkowski*, 492 F.3d 1264, 1268-1269 (11th Cir. 2007); see also *United States* v. *Dixon*, 273 F.3d 636, 640 n.2 (5th Cir. 2001) (dicta), cert. denied, 537 U.S. 829 (2002). In addition to the First Circuit in the decision below, one other court of appeals has held that firearm type is an offense element. See *United States* v. *Harris*, 397 F.3d 404, 412, 414 (6th Cir. 2005).

A. Section 924(c)(1)'s Language And Structure Show That Firearm Type Is A Sentencing Factor

This Court looks principally to a statute's language and structure to determine whether a particular provision states an element of a separate offense, or a sentencing factor to be considered by the judge. See *Harris*, 536 U.S. at 552-554; *Castillo*, 530 U.S. at 124-125; *Jones*, 526 U.S. at 232-234. Here, both of those factors compel the conclusion that the type of firearm involved in a Section 924(c)(1) offense is a sentencing factor.

1. The language of Section 924(c)(1) states that firearm type is a sentencing factor

This Court "start[s], as always, with the language of the statute." *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009) (quoting *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000)). The current text of Section 924(c)(1) is unequivocal in specifying that firearm type is a sentencing factor. The opening phrase of Section 924(c)(1)(B) makes clear that the firearm-type enhancements apply to "a person *convicted of a violation* of this subsection." 18 U.S.C. 924(c)(1)(B) (emphasis added). "Convicted of'" refers to a finding of guilt, which necessarily precedes sentencing. See *Deal* v. *United States*, 508 U.S. 129, 132 (1993) ("In the context of [Section] 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury."). Because firearm type becomes relevant under the statutory scheme only after the defendant has been found guilty (*i.e.*, "convicted of a violation"), firearm type cannot be an element of the offense.

That firearm type is a sentencing factor is reinforced by Clauses (B)(i) and (B)(ii), which specify how certain defendants "shall be sentenced." While the principal

paragraph of Section 924(c)(1)(A) focuses on the defendant's active conduct in committing the offense, the balance of the provision focuses on the varied sentencing consequences that may follow depending on the facts. By directing that a person who uses a machinegun in committing the offense defined in the principal paragraph of Section 924(c)(1)(A) "shall be sentenced" to a term not less than 30 years, Clause (B)(ii) makes evident that firearm type is a sentencing factor.

The introductory text of Section 924(c)(1)(A) confirms the conclusion that Clauses (B)(i) and (B)(ii) do not each define a new crime separate from the single offense stated in the principal paragraph of Section 924(c)(1)(A). Section 924(c)(1)(A) begins: "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." This language ensures that the defendant will be subject to the highest applicable minimum sentence for the conduct described in the principal paragraph of Section 924(c)(1)(A)—whether that sentence is specified in Section 924(c) itself, or elsewhere. See, *e.g.*, *United States* v. *Abbott*, 574 F.3d 203, 208 (3d Cir. 2009), petition for cert. pending, No. 09-479 (filed Oct. 19, 2009). Congress's reference to the existence of "greater minimum sentence[s]" strongly suggests that the enhancements "otherwise provided by this subsection" bear on sentencing, not guilt. Congress did not refer to greater minimum sentences for "greater offenses." Thus, the introductory language of Section 924(c)(1)(A) is most consistent with the view that Congress enacted a single crime in the principal paragraph of Section 924(c)(1)(A), with "greater minimum sentence" provisions specified elsewhere in Section 924(c). Cf. *Almendarez-Torres*, 523 U.S. at 231 ("The statute includes the words 'subject

to subsection (b)' at the beginning of subsection (a) * * *. If Congress intended subsection (b) to set forth substantive crimes, in respect to which subsection (a) would define a lesser included offense, what are those words doing there?") (citation omitted).[3]

"[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). Because the text of Section 924(c)(1)(B) designates "sentenc[ing]" considerations for persons "convicted of a violation" described in Section 924(c)(1)(A), the language leaves no doubt that firearm type is a sentencing factor.

2. The structure of Section 924(c)(1) shows that firearm type is a sentencing factor

The structure of Section 924(c) provides an equally powerful indication that firearm type is a sentencing factor. See *Harris*, 536 U.S. at 554 (relying on a "presumption drawn from [the] structure" of the

---

[3] Currently pending before the Court is the government's petition for a writ of certiorari in *United States* v. *Williams*, No. 09-466 (filed Oct. 20, 2009), which presents the question whether the "except" clause prohibits imposition of a Section 924(c) sentence if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense for different conduct. *Abbott*, *supra*, typifies the overwhelming view of the courts of appeals that the "except" clause is not such a prohibition. But whether or not the "except" clause directs the sentencing court's attention to sentences for other offenses, there can be no dispute that it requires the court to consider the mandatory minimum sentences specified in Subparagraphs (A), (B), and (C). The language thus confirms Congress's intention that the principal paragraph of Section 924(c)(1)(A) state a complete crime, with the balance of Subparagraph (A), and Subparagraphs (B) and (C), stating sentencing factors.

statute in finding that "brandish[ing]" under Section 924(c)(1)(A)(ii) is a sentencing factor). Consistent with the plain meaning of its text, the structure of the current version of Section 924(c)(1) strongly implies that the firearm-type provisions are sentencing factors.

a. Because this is the very statute that *Harris* construed, *Harris*'s inferences from the structure of Section 924(c)(1) apply here with equal force. As *Harris* notes, "[f]ederal laws usually list all offense elements 'in a single sentence' and separate the sentencing factors 'into subsections.'" 536 U.S. at 552 (quoting *Castillo*, 530 U.S. at 125). *Harris* singled out several features that place the current version of Section 924(c)(1) in that mold: "a lengthy principal paragraph listing the elements of a complete crime," followed by "the word 'shall,' which often divides offense-defining provisions from those that specify sentences," and finally "separate subsections, which explain how defendants are to 'be sentenced,'" and which "do not repeat the elements from the principal paragraph." *Id.* at 552-553 (citation omitted). "When a statute has this sort of structure, we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors." *Id.* at 553; accord *Jones*, 526 U.S. at 232-233.

The structural reasons to presume that Subparagraph (B) states sentencing factors are as strong as, if not stronger than, in *Harris*. The same "lengthy principal paragraph listing the elements of a complete crime," *Harris*, 536 U.S. at 552, is of course present here. Like the brandishing and discharging provisions, the firearm-type provisions are "separate[d] * * * 'into subsections'" that "explain how defendants are to 'be sentenced.'" *Harris*, 536 U.S. at 552 (quoting *Castillo*, 530 U.S. at 125). Subparagraph (B) "do[es] not repeat

the elements from the principal paragraph," *id.* at 553. Rather, Subparagraph (B) addresses specific subcategories of an offense element ("the firearm") already stated in the offense-defining language of Subparagraph (A).[4] And the case is made still stronger because, unlike the brandishing provision, the firearm-type provisions are not even in the same sentence or subparagraph as the offense-defining language. The two are separate sentences with "[t]he principal paragraph [of Section 924(c)(1)(A)] defin[ing] a complete offense." *Dean*,

---

[4] Virtually every weapon described in Subparagraph (B) is by definition a "firearm" under 18 U.S.C. 921(a)(3):

> The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

Ibid. Under the definitions in 18 U.S.C. 921(a)(5)-(8), "short-barreled rifle[s]" and "short-barreled shotgun[s]" satisfy the criteria in 18 U.S.C. 921(a)(3)(A). "Destructive device[s]," "firearm silencer[s]," and "firearm muffler[s]" are by definition firearms under 18 U.S.C. 921(a)(3)(C) and (D).

Under 18 U.S.C. 921(a)(23), "the term 'machinegun' has the meaning given such term in * * * 26 U.S.C. 5845(b)." Section 5845(b) in turn provides in relevant part that "'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. 5845(b). That definition covers any fully automatic weapon, see *Staples*, 511 U.S. at 602 & n.1, and the vast majority of "machineguns" are "firearms" under 18 U.S.C. 921(a)(3)(A). Although there are "machineguns" that do not operate "by the action of an explosive," and so are not "firearms" under 18 U.S.C. 921(a)(3)(A), these weapons would not be the basis for an enhanced sentence under Section 924(c)(1)(B)(ii) because they could not properly be the subject of a conviction under Section 924(c)(1)(A) in the first instance.

129 S. Ct. at 1853; see also *id.* at 1854 ("The basic crime here is using or carrying a firearm during and in relation to a violent or drug trafficking crime, or possessing a firearm in furtherance of any such crime.").

b. The structural inference that Section 924(c)(1)(B) states sentencing factors is confirmed by its location in the statute: firearm type is surrounded by matters bearing exclusively on sentencing. This Court held in *Harris* and *Dean* that brandishing and discharging in Clauses (A)(ii) and (iii) are sentencing factors. See *Harris*, 536 U.S. at 552-556; *Dean*, 129 S. Ct. at 1854. Clauses (C)(i) and (ii) relate principally to recidivist sentencing, and the courts of appeals to have considered the question unanimously view those enhancements as sentencing factors.[5] Indeed, this Court has recognized that recidivism is a classic sentencing factor. See *Monge* v. *California*, 524 U.S. 721, 728-729 (1998); *Almendarez-Torres*, 523 U.S. at 230. Finally, Clauses (D)(i) and (ii) explicitly pertain to sentencing by prohibiting the imposition of probation and providing for a consecutive sentence. See *Castillo*, 530 U.S. at 125 (provisions on recidivism and consecutive sentences "refer directly to sen-

---

[5] See *United States* v. *Rivera-Rivera*, 555 F.3d 277, 290-292 (1st Cir.), cert. denied, 130 S. Ct. 344 (2009); *United States* v. *Mejia*, 545 F.3d 179, 207-208 (2d Cir. 2008); *United States* v. *Williams*, 65 Fed. Appx. 819, 823 (3d Cir.), cert. denied, 540 U.S. 932 (2003); *United States* v. *Cristobal*, 293 F.3d 134, 147-148 (4th Cir.), cert. denied, 537 U.S. 963 (2002); *United States* v. *Smith*, 296 F.3d 344, 348-349 (5th Cir.), cert. denied, 537 U.S. 1012 (2002), and 538 U.S. 935 (2003); *United States* v. *Davis*, 306 F.3d 398, 411-412 (6th Cir. 2002), cert. denied, 537 U.S. 1208 (2003); *United States* v. *Hatcher*, 501 F.3d 931, 934-935 (8th Cir. 2007), cert. denied, 128 S. Ct. 1133 (2008); *United States* v. *Madrid*, 222 Fed. Appx. 721, 736 (10th Cir. 2007) (per curiam); *United States* v. *Woodruff*, 296 F.3d 1041, 1049-1050 (11th Cir. 2002), cert. denied, 537 U.S. 1114 (2003).

tencing"). The positioning of Subparagraph (B) in the midst of a series of sentencing factors reinforces the conclusion that firearm type is such a factor as well.

In contrast, the court of appeals' interpretation of Section 924(c)(1) produces a structurally disorganized intermingling of sentencing factors and offense elements, rather than an orderly progression from offense elements to sentencing considerations. On the court of appeals' view:

- Congress first spoke of elements, in the principal paragraph of Subparagraph (A). See *Dean*, 129 S. Ct. at 1853.
- Then Congress spoke of sentencing factors, in Clauses (A)(ii) and (iii). See *Harris*, 536 U.S. at 552-556; *Dean*, 129 S. Ct. at 1854.
- Then Congress spoke again of offense elements, in Clauses (B)(i) and (ii). See Pet. App. 1a-10a.
- Then Congress spoke again of sentencing factors, in Clause (C)(i). See, *e.g.*, *United States* v. *Rivera-Rivera*, 555 F.3d 277, 290-292 (1st Cir.), cert. denied, 130 S. Ct. 344 (2009).
- And finally, Congress spoke partly of sentencing factors, but partly of offense elements, in Clause (C)(ii) (which addresses recidivist sentencing when the firearm is a machinegun or other firearm specified in Clause (B)(ii)).

It is most unlikely that the Congress that overhauled the entirety of Section 924(c)(1) with obvious attention to its structure and organization intended such a illogical construction. Cf. *Jones*, 526 U.S. at 256 (Kennedy, J., dissenting) ("It is difficult to see why Congress would dou-

ble back and insert additional elements for the jury's consideration in [later] clauses.").

B. Secondary Factors That This Court Has Considered Also Favor Treating Firearm Type As A Sentencing Factor

In deciding whether Congress intended a statutory provision to state an offense element or a sentencing factor, this Court has also referred to interpretive guides besides language and structure—such as the traditional treatment of the fact at issue, the length of the enhanced sentence, and legislative history. See *Harris*, 536 U.S. at 553-554 (tradition); *id.* at 554 (sentence length); *Castillo*, 530 U.S. at 126 (tradition); *id.* at 129-130 (legislative history); *id.* at 131 (sentence length); *Jones*, 526 U.S. at 233 (sentence length); *id.* at 234-237 (tradition); *id.* at 238-239 (legislative history); *Almendarez-Torres*, 523 U.S. at 230 (tradition); *id.* at 234 (legislative history); *id.* at 235-236 (sentence length).

These guides, however, are secondary to language and structure. Congress may legislate in light of tradition on a given subject matter, but it is also free to break from tradition within broad constitutional limits. See *United States* v. *Harrison*, 272 F.3d 220, 227 (4th Cir. 2001) (Motz, J., concurring in the judgment) ("[T]he goal of our analysis is to ascertain Congress' intent, and Congress can make firearm type a sentencing factor if it writes language that is clear enough to do so, even in light of the strong contrary tradition [asserted in *Castillo*]."), cert. denied, 537 U.S. 839 (2002). Likewise, when "the statutory language is clear, there is no need to reach * * * arguments based on statutory purpose, legislative history, or the rule of lenity." *Boyle* v. *United States*, 129 S. Ct. 2237, 2246 (2009). As for the length of the enhanced sentence, "the fixing of prison

terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Harmelin* v. *Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 275-276 (1980)).

Thus, the Court has taken guidance from these secondary considerations only when the statute's language proves "neutral," *Castillo*, 530 U.S. at 124, or "does not justify any confident inference," *Jones*, 526 U.S. at 234. That is manifestly not the case here. See pp. 14-21, *supra*. Even so, these secondary guides favor treating firearm type in Section 924(c)(1)(B)(ii) as a sentencing factor.

1. Enhanced minimum sentences for particularly dangerous firearms have often turned on judicial fact-finding at sentencing

Where tradition is concerned, the *Castillo* Court "[could] not say that courts have typically or traditionally used firearm types * * * as sentencing factors," but neither did it point to any consistent tradition of legislatures treating firearm type as an offense element. 530 U.S. at 126-127. Compare *ibid.* (pointing to no clear tradition), with *Jones*, 526 U.S. at 235 ("[Congress] has unmistakably identified serious bodily injury as an offense element in any number of statutes."). Although *Castillo* may have been correct in seeing no tradition of treating firearm type as a sentencing factor in pre-Sentencing Guidelines statutory law, the current version of Section 924(c)(1) belongs to a somewhat different tradition, for two reasons.

First, at the time of the 1998 overhaul of Section 924(c)(1), the then-mandatory federal Sentencing Guidelines reflected a strong federal practice of elevating sentences based on the sentencing judge's findings about the type of firearm used in a crime. This practice was followed even where the presence of a firearm was "the element lying closest to the heart of the crime at issue," *Castillo*, 530 U.S. at 126-127. For example, under Sentencing Guidelines § 2K2.1(a)(7) (1998), a first-time offender guilty of unlawful receipt, possession, or transportation of a firearm—including the familiar felon-in-possession offense of 18 U.S.C. 922(g)(1)—would have been assigned a base offense level of 12. But under Sentencing Guidelines § 2K2.1(a)(5) (1998), his base offense level would instead be 18 (roughly doubling his ultimate minimum sentence) "if the offense involved a firearm described in 26 U.S.C. § 5845(a)," a provision that covers every one of the firearms singled out in 18 U.S.C. 924(c)(1)(B). A further two-level enhancement applied "[i]f the offense involved a destructive device." Sentencing Guidelines § 2K2.1(b)(3) (1998). Treating firearm type in Section 924(c)(1) as a sentencing factor is entirely consistent with the Guidelines' practice of committing nearly identical questions to the sentencing judge.[6]

---

[6] Section 2K2.1 applies to the vast majority of firearm-based offenses. See Sentencing Guidelines § 2K2.1 comment. (statutory provisions) (1998). A similar practice was reflected in the Sentencing Guidelines for unlicensed export of arms: An offense involving ten or fewer "non-fully automatic small arms (rifles, handguns, or shotguns)" was assigned a base offense level of 14, but an offense involving more serious weapons was assigned a base offense level of 22. See *id.* § 2M5.2(a).

More generally, upward departures were potentially available for any offense "[i]f a weapon or dangerous instrumentality was used or possessed in the commission of the offense." Sentencing Guidelines § 5K2.6 (1998). In that scheme, "[t]he extent of the increase ordinarily

Second, Subparagraph (B)'s effect of increasing a minimum sentence within an authorized range places it in the company of traditional sentencing factors. The escalating mandatory minimum sentences in the current version of Section 924(c)(1) direct the sentencing judge to exercise her discretion within the narrower range Congress deems appropriate for the particularly dangerous firearms enumerated in Clauses (B)(i) and (ii). Such mandatory minimum sentences are "more consistent with traditional understandings about how sentencing factors operate" because "the required findings constrain, rather than extend, the sentencing judge's discretion." *Harris*, 536 U.S. at 554. Indeed, this Court has never held a provision that affects only the minimum sentence to be an offense element. Such factors stand in sharp contrast to factors about a crime that allow a judge to impose a longer sentence at her discretion; those factors (except recidivism) now function as "elements" by virtue of constitutional command. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000).

2. The lengths of the sentences provided by Section 924(c)(1)(B) do not suggest that the triggering facts are elements

a. Each of this Court's relevant cases mentions the effect of the statutory provision at issue on the length of the mandatory minimum or maximum possible term of imprisonment. For example, *Jones* adverted to the "steeply higher penalties * * * condition[ed] on fur-

---

should depend on the dangerousness of the weapon" among other factors. *Ibid.* See also *id.* § 5K2.17 ("If the defendant possessed a high-capacity, semiautomatic firearm in connection with a crime of violence or controlled substance offense, an upward departure may be warranted.").

ther facts." 526 U.S. at 233. But the importance of sentence length in *Jones* cannot be divorced from the then-unsettled constitutional question whether a statutory maximum sentence could be increased on the basis of a fact that was not charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. See *ibid.* As *Harris* explained in distinguishing *Jones*, sentence length is less indicative of congressional intent when the provision affects only the minimum sentence within an authorized range:

> Section 924(c)(1)(A) does not authorize the judge to impose "steeply higher penalties"—or higher penalties at all—once the facts in question are found. Since the subsections alter only the minimum, the judge may impose a sentence well in excess of [the mandatory minimum], whether or not the [sentencing factor applies].

536 U.S. at 554. *Harris*'s treatment of sentence length is appropriate here too, because Section 924(c)(1)(B) alters only the minimum sentence. The finding of a machinegun's involvement in the offense does not increase the defendant's exposure to punishment because even without such a finding, the judge can impose up to a life sentence for any Section 924(c)(1) conviction.

b. Even if sentence length mattered in deciding whether a statutory provision establishing a mandatory minimum sentence states an offense element or a sentencing factor, the elevated minimum sentences in Section 924(c)(1)(B) are not aberrational. Within Section 924(c)(1), the ten-year minimum sentence prescribed in Clause (B)(i) is the same as the ten-year minimum prescribed in Clause (A)(iii), which this Court characterized as "precisely what one would expect to see in provisions

meant to identify matters for the sentencing judge's consideration." *Harris*, 536 U.S. at 554. The 30-year minimum sentence in Clause (B)(ii) is longer (though the clause is in all other respects precisely parallel to Clause (B)(i)). But the enhancement in Clause (B)(ii) to a 30-year minimum sentence is comparable to enhancements for similarly dangerous or heinous conduct that Congress has identified as sentencing factors:

Enhancement for kidnapping victim being a minor. Under 18 U.S.C. 1201(a), kidnapping is punishable by imprisonment for any term of years, with no minimum term of imprisonment. If, however, the victim is a minor and the offender is a stranger to the victim, 18 U.S.C. 1201(g)(1) requires a term of imprisonment of at least 20 years. Section 1201(g)(1) has not been the subject of an appellate decision, but its language—"If * * * the victim of an offense under this section has not attained the age of eighteen years; and [the offender is an adult who neither has legal custody of the victim nor is a close family relative,] the sentence under this section for such offense shall include imprisonment for not less than 20 years"—unmistakably defines a sentencing factor.

Sentencing Guidelines terrorism adjustment. Sentencing Guidelines § 3A1.4 provides for a 12-level increase in the defendant's offense level (or a minimum offense level of 32) and a criminal history category of VI if the defendant's offense "is a felony that involved * * * a federal crime of terrorism." "Federal crime of terrorism" is defined to include any of several dozen offenses listed in 18 U.S.C. 2332b(g)(5)(B)(i)-(iv), when the offense "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," 18 U.S.C. 2332b(g)(5)(A).

This provision is the product of a congressional directive to the Sentencing Commission.[7] In the context of the then-mandatory Sentencing Guidelines, that directive was functionally similar to the enactment of statutory mandatory minimum sentences for each of the Federal crimes of terrorism enumerated in 18 U.S.C. 2332b(g)(5)(B): either would result in the imposition of elevated minimum terms of imprisonment based on facts found by the judge at sentencing.

Even in the context of advisory Sentencing Guidelines under *United States* v. *Booker*, 543 U.S. 220 (2005), the application of the terrorism adjustment leads to significantly greater advisory sentencing ranges. For example, in *United States* v. *Chandia*, 514 F.3d 365 (4th Cir. 2008), the defendant was convicted of, *inter alia*, providing material support to a designated foreign terrorist organization, and conspiracy to do the same, in violation of 18 U.S.C. 2339B. On those facts, without the terrorism adjustment, the defendant's advisory Sentencing Guidelines range would have been 63-78 months; but with the adjustment, it was 360 months to life. *Chandia*, 514 F.3d at 370. The magnitude of that enhancement almost exactly equals the enhancement prescribed by Section 924(c)(1)(B)(ii).

---

[7] Originally, the provision existed to address international terrorism. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 2022 (congressional directive); Sentencing Guidelines App. C, amend. 526 (adding Sentencing Guidelines § 3A1.4). Congress later directed that the international terrorism adjustment—including its offense level and criminal history category increases—be applied to the newly defined Federal crimes of terrorism. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1303 (congressional directive); Sentencing Guidelines App. C, amend. 539 (temporary amendment of Sentencing Guidelines § 3A1.4); *id.* amend. 565 (permanent amendment).

Enhancement for leadership role in a continuing criminal enterprise. Under 21 U.S.C. 848(a), any person who engages in a continuing criminal enterprise (defined in 21 U.S.C. 848(c) as a type of organized drug trafficking) is subject to a 20-year mandatory minimum sentence. Under 21 U.S.C. 848(b), the principal leaders of large enterprises are subject to a mandatory life term of imprisonment. The 21 U.S.C. 848(b) determination raising the minimum sentence from 20 years of imprisonment to life imprisonment is a sentencing factor. See, *e.g.*, *United States* v. *Tidwell*, 521 F.3d 236 (3d Cir.), cert. denied, 129 S. Ct. 762 (2008); *United States* v. *Smith*, 223 F.3d 554, 562, 566 (7th Cir. 2000) (Wood, J.), cert. denied, 536 U.S. 957 (2002).

Recidivism enhancements. As this Court recognized in *Almendarez-Torres*, 523 U.S. at 236, a number of federal statutes provide for greatly increased minimum (or maximum) sentences for repeat offenders, which is "as typical a sentencing factor as one might imagine," *id.* at 230. Section 924(c)(1) itself is an example: a first offense carries a minimum five-year sentence under Clause (A)(i), but a second offense carries a minimum 25-year sentence under Clause (C)(i). Substantial recidivism enhancements imposing long mandatory minimum sentences—even when the offenses involved are less dangerous than the conduct at issue here—appear in numerous statutes.[8] They too show that treating Section

---

[8] See, *e.g.*, 18 U.S.C. 2241(c) (aggravated sexual abuse of a child; 30-year minimum sentence for first offense; mandatory life imprisonment for second offense); 18 U.S.C. 2251(e) (sexual exploitation of children; 15-year minimum sentence for first offense; 25-year minimum sentence for second offense; 35-year minimum sentence for third offense); 18 U.S.C. 2252(b)(1) (commerce in depictions of a minor engaging in sexually explicit conduct; 5-year minimum sentence for first offense; 15-

924(c)(1)(B)(ii) as a sentencing factor, notwithstanding the lengthy mandatory minimum it provides, is consistent with other federal sentencing law.

3. The relevant legislative history is silent, but the nature and context of the 1998 overhaul of Section 924(c)(1) favor treating firearm type as a sentencing factor

The legislative history of the 1998 overhaul of Section 924(c)(1) is silent on the question presented. From that silence, respondents infer that Congress's sole intent was to broaden Section 924(c)(1)'s reach beyond the limits recognized in *Bailey* v. *United States*, 516 U.S. 137 (1995), a purpose that is evident throughout the legislative history. See O'Brien Br. in Opp. 15; Burgess Br. in Opp. 21-22. But this Court does not interpret statutes

---

year minimum sentence for second offense); 18 U.S.C. 2252A(b)(1) (same for child pornography); 18 U.S.C. 2252(b)(2) (possession of depictions of a minor engaging in sexually explicit conduct; no minimum sentence for first offense; 10-year minimum sentence for second offense); 18 U.S.C. 2252A(b)(2) (same for child pornography); 18 U.S.C. 922(g), 924(a)(2) and (e)(1) (Armed Career Criminal Act; no minimum sentence for first offense of felon-in-possession; 15-year minimum sentence for offender with three prior convictions for a violent felony or serious drug offense); 21 U.S.C. 841(b)(1)(A) (manufacture or distribution of one kilogram of heroin or equivalent quantities of other controlled substances; 10-year minimum sentence for first offense, or 20 years if death or serious bodily injury results; 20-year minimum sentence for second offense, or mandatory life imprisonment if death or serious bodily injury results; mandatory life imprisonment for offender with two prior convictions for felony drug offenses); 21 U.S.C. 960(b)(1) (same for unlawful importation of controlled substances, except no special provision for offender with two prior convictions for felony drug offenses); 21 U.S.C. 848(a) (continuing criminal enterprise; 20-year minimum sentence for first offense; 30-year minimum sentence for second offense).

based on what Congress did not say in the legislative history. "[L]egislative history need not confirm the details of changes in the law effected by statutory language before [this Court] will interpret that language according to its natural meaning." *Morales* v. *TWA*, 504 U.S. 374, 385 n.2 (1992).

More significant is what Congress actually did. The nature and context of the 1998 changes to Section 924(c)(1) support treating firearm type as a sentencing factor. Most prominently, the 1998 overhaul had the effect of (1) moving the firearm-type provisions into a separate sentence prefaced with the phrase "a person convicted of"; (2) structuring the basic offense in a principal paragraph followed by subparagraphs declaring how defendants are "to be sentenced"; and (3) discarding escalating determinate sentences in favor of creating a single maximum coupled with mandatory minimum sentences. These changes were made before *Jones* and *Castillo* stressed the importance of structural features in signaling that a provision is a sentencing factor, but Congress's structural choices are no less significant because they anticipated this Court's explicit recognition of their meaning. And in turning to mandatory minimum sentences, Congress acted with presumptive awareness of this Court's decision in *McMillan* v. *Pennsylvania*, 477 U.S. 79, 89-90 (1986), which established the constitutionality of increasing a minimum sentence within a statutory range based on sentencing factors relating to the offense. Indeed, at the time of the 1998 amendment to Section 924(c)(1), this Court had never construed any federal criminal law to treat as an element a fact that raised the minimum sentence within an already authorized range—nor, for that matter, has the Court done so since.

C. This Court Should Respect Congress's Sound Policy Choice To Treat Firearm Type As A Sentencing Factor

This Court has also been mindful of the policy considerations behind Congress's choice to make a provision an offense element or a sentencing factor. See *Castillo*, 530 U.S. at 127-128; *Almendarez-Torres*, 523 U.S. at 234-235. Congress's choice to create sentencing factors in Section 924(c)(1)(B) serves sound policy objectives. The particular firearms that trigger enhanced sentences—machineguns, silencers, sawed-off shotguns and rifles, bombs, grenades, missiles, mines, and the like—are some of the most dangerous and threatening weapons available.[9] Most can readily inflict enormous harm in a very short time, and many have no legitimate purpose outside the military and law enforcement contexts. For example, short-barreled shotguns (covered by Clause (B)(i)) are "particularly dangerous because of the

---

[9] For a time, Section 924(c)(1) also provided an enhanced minimum sentence when the firearm involved was a "semiautomatic assault weapon." The reference was added in 1994 by the Public Safety and Recreational Firearms Use Protection Act (PSRFUPA), Pub. L. No. 103-322, Tit. XI, Subtit. A, § 110102(c)(2), 108 Stat. 1998. But PSRFUPA further provided that it would sunset ten years after its effective date. § 110105(2), 108 Stat. 2000. The Office of Legal Counsel has recently concluded that the intervening 1998 amendment of Section 924(c)(1), which carried forward the reference to semiautomatic assault weapons in Clause (B)(i), did not repeal the PSRFUPA sunset. See Memorandum from Jeannie Rhee, Deputy Assistant Att'y Gen., Dep't of Justice, *Whether the Ten-Year Minimum Sentence in 18 U.S.C. § 924(c)(1)(B)(i) Applies to Semiautomatic Assault Weapons* (Nov. 24, 2009). The semiautomatic assault weapon language was therefore repealed in 2004, taking Section 924(c)(1) offenses involving semiautomatic assault weapons out of Section 924(c)(1)(B)(i), though leaving them subject to the general penalty provisions of Section 924(c)(1)(A). *Id.* at 1, 14.

wide pattern in which the pellets are distributed." *United States* v. *Duerson*, 25 F.3d 376, 384 (6th Cir. 1984). Machineguns, silencers, and destructive devices (covered by Clause (B)(ii)) are even more dangerous. Machinegun fire "can be devastating: A fully automatic MAC-10 can fire more than 1,000 rounds per minute." *Smith* v. *United States*, 508 U.S. 223, 225 (1993). The 31-round magazine in the Cobray MAC-11 machinegun at issue here could have been emptied with one pull of the trigger in under two seconds. Silencers and mufflers are the tools of stealthy, premeditated crimes. And destructive devices—bombs, missiles, rockets, and the like —are typically instruments of warfare with enormous destructive potential. *United States* v. *Freed*, 401 U.S. 601, 609 (1971) ("[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons.") (footnote omitted).

Every Section 924(c)(1) offense is serious. As this Court noted with reference to the prior version of Section 924(c)(1), Congress "was no doubt aware that drugs and guns are a dangerous combination," and firearms and violent crime are the same. *Smith*, 508 U.S. at 240. That alone "creates a grave possibility of violence and death," *ibid.*, irrespective of the particular firearm's capabilities. But Congress's evident judgment is that certain types of firearms are so dangerous, so threatening, and so often illegitimate, that when used to facilitate a drug trafficking crime or a crime of violence, an enhanced minimum sentence is required. More specifically, Congress's judgment is that use of those particular firearms is grave enough to require elevated minimum penalties for an offense that, even without such use, is grave enough to carry a life maximum.

Congress's treatment of firearm type as a sentencing factor has at least two important benefits. First, judicial fact-finding and appellate review ensure consistent application of the firearm-type enhancement. That is no small concern where such an important crime-control interest is at stake. Second, this treatment simplifies and streamlines guilt-stage proceedings, without interfering with the accuracy of fact-finding. The evidence showing that a firearm has the characteristics that make it one of the firearms enumerated in Subparagraph (B) is essentially technical. Such evidence concerns, for example, whether certain parts of the weapon measure less than a certain length, the weapon fires fully automatically, or the device contains a certain minimum quantity of explosive. Although such evidence is usually clear-cut and can be grasped by a jury, see *Castillo*, 530 U.S. at 127, Congress could reasonably wish to avoid burdening the trial process with it. Even if that burden and additional complexity are modest, no great policy interest would be served by treating firearm type as an offense element because a jury determination is unlikely to improve the accuracy of fact-finding on such an issue.

Finally, treating firearm type as an offense element would seriously disserve Congress's policy objectives if that meant the government would have to prove the defendant's knowledge of his firearm's characteristics, as some courts (and the government in this case) have assumed.[10] Compare *United States* v. *Ciszkowski*, 492 F.3d 1264, 1268 (11th Cir. 2007) (firearm characteristics

---

[10] The correctness of the government's concession below is not a question presented here. No count before this Court charges, as an element, that the Cobray was a machinegun. The availability of the increased minimum sentence in this case therefore rises or falls on whether the machinegun determination is a sentencing factor for the judge.

are sentencing factors, and the government need not prove a defendant's knowledge of those characteristics); *United States* v. *Gamboa*, 439 F.3d 796, 812 (8th Cir.) (same), cert. denied, 549 U.S. 1042 (2006), with J.A. 42 (government's concession below that if firearm characteristics are offense elements, the government would need to prove respondents' knowledge of the characteristics); Pet. App. 8a (decision below implying that it would require proof of defendant's knowledge); *United States* v. *Hoosier*, 442 F.3d 939, 944 (6th Cir. 2006) (describing indictment alleging "knowing possession of an SKS assault rifle").

As in this case, knowledge of firearm characteristics may be difficult to establish. For example, "virtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun," yet "[s]uch a gun may give no externally visible indication that it is fully automatic," *Staples*, 511 U.S. at 615. Thus, it can be difficult or impossible for the government to prove a defendant's knowledge of the nature of the firearm other than by specific witness testimony on that issue, which the government often lacks. But the offender who does not know the danger his firearm poses is no less likely to cause great harm than the offender who does. There is no indication Congress wanted to exonerate oblivious offenders in this statute. Cf. *Dean*, 129 S. Ct. at 1855 ("The fact that the actual discharge of a gun * * * may be accidental does not mean that the defendant is blameless.").

D. This Court's Decision In *Castillo* Does Not Control The Interpretation Of The Current Version Of Section 924(c)(1)

In *Castillo*, this Court construed the prior version of Section 924(c)(1) to treat firearm type as an offense element. The Court relied on five factors in reaching that conclusion: language and structure, tradition, policy, legislative history, and the length and severity of the sentence. *Castillo*, 530 U.S. at 124-131. The court of appeals found *Castillo* "close to binding" in the absence of "a clearer or more dramatic change in language or legislative history expressing a specific intent." Pet. App. 10a. But most of these factors—and certainly the most important ones—do in fact evince a "clear[]" and "dramatic" change from the prior version of the statute.

First, the current version of Section 924(c)(1) differs decisively in language and structure from the prior version. The "literal language" of the prior version, "taken alone, appear[ed] neutral," because its first sentence included not only the "basic elements" of "uses or carries a firearm" and "during and in relation to a crime of violence," but also "the subsequent 'machinegun' phrase." *Castillo*, 530 U.S. at 124. The single sentence did not specify the relationship between the basic elements and the "machinegun" phrase. Thus, "one could read" the basic elements as stating the complete crime, "[b]ut, with equal ease, by emphasizing the phrase 'if *the* firearm is a . . . ,'" read the "machinegun" phrase as "creating a different crime containing one new element." *Ibid.* That is, "one can read the [prior version's] language as simply substituting the word 'machinegun' for the initial word 'firearm.'" *Ibid.*

The current version of Section 924(c)(1) is not so variously interpreted. The principal paragraph of Subpara-

graph (A) is on its face a complete enumeration of the elements of an offense. The firearm type provisions of Subparagraph (B) are grammatically, structurally, and conceptually removed from Subparagraph (A), leaving no ambiguity about where to place the emphasis in the offense-defining sentence. Nor is *Castillo*'s approach of "substituting the word 'machinegun' for the initial word 'firearm,'" 530 U.S. at 124, viable here, because Subparagraph (B)'s restriction to "a person convicted of a violation" precludes pressing the requirement of a "machinegun" into the service of deciding whether the defendant should be "convicted of a violation" to begin with.

As for structure, *Castillo*'s analysis relied entirely on features of the prior version of Section 924(c)(1) that now are gone. In the prior version, "Congress placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence not broken up with dashes or separated into subsections." *Castillo*, 530 U.S. at 124-125. Now, of course, "machinegun" is in a different sentence, and it is "broken up with dashes" and "separated into subsections." The court of appeals below gave these structural dissimilarities no weight, dismissing them as the product of a "current trend" to reorganize criminal statutes "in the fashion of the tax code." Pet. App. 9a. But that cannot be squared with this Court's recognition that structure is an important guide to meaning. And as *Castillo* itself acknowledged, the "statutory restructuring" of Section 924(c) "suggest[s] a contrary interpretation" to the one this Court reached in *Castillo*. 530 U.S. at 125.

Second, even if there were no federal tradition of treating firearm type as a sentencing consideration in 1986 (when the provision at issue in *Castillo* was first

enacted), see *Castillo*, 530 U.S. at 126-127, that tradition had emerged by the time of the 1998 overhaul of Section 924(c)(1), reflected most obviously in the Sentencing Guidelines, see pp. 22-23 and note 6, *supra*. Moreover, the prior version of Section 924(c)(1) prescribed determinate sentences for specific conduct. Determinate sentences may be more in line with the offense element tradition (and after *Apprendi*, necessarily are associated with offense elements); mandatory minimum sentences, by contrast, are overwhelmingly (perhaps even exclusively) associated with the sentencing factor tradition. See *Harrison*, 272 F.3d at 227 (Motz, J., concurring in the judgment) ("Congress * * * ma[d]e firearm type a sentencing factor * * * by failing to provide for determinate sentences.").

Third, the Court's principal policy concern in *Castillo* was that in cases involving multiple firearms, a sentencing judge could conceivably apply a firearm-type enhancement based on a weapon that was not the basis of the jury's finding of guilt. See 530 U.S. at 128. But that consideration should not carry too much weight. The issue seems to arise infrequently (if at all), even though many circuits have held that firearm type is a sentencing factor under the current version of Section 924(c)(1). And when it arises, the jury can be asked to return a special verdict form identifying the firearm(s) on which it based its verdict.

Fourth, if legislative history was instructive in *Castillo*, it "argue[d] *against* (not *for*) the Government's position." 530 U.S. at 130. Here, there is no relevant legislative history, but nothing can be gleaned from that silence. See *Morales*, 504 U.S. at 385 n.2. Nor can anything be taken from Congress's inaction after *Castillo*, given that *Castillo* did not address the new version of

the statute. If anything, *Castillo*'s refusal to construe the new statute, see 530 U.S. at 125, would have given Congress confidence that the new version would be taken on its own terms—which is precisely what the majority of the courts of appeals have done. This Court's decision in *Harris* would only have reinforced the view that no further amendment of Section 924(c)(1) was necessary to achieve Congress's objective of stating a single, complete offense in the principal paragraph of Subparagraph (A), followed by a variety of sentencing factors.

Fifth, the multiple, significant changes in Section 924(c)(1) make the length of the sentence enhancement at issue less meaningful than in *Castillo*. When longer and more severe sentences are at stake, the Court may —"after considering traditional interpretive factors" and finding itself "genuinely uncertain as to Congress' intent"—"assume a preference for traditional jury determination." *Castillo*, 530 U.S. at 131. But there can be no "genuine[] uncertain[ty]" here. Section 924(c)(1)'s current language and structure overwhelmingly favor treating firearm type as a sentencing factor. And in any event, the current version of Section 924(c)(1)(B)(ii), unlike its precursor, does not authorize longer sentences. Congress's decision to set only minimum sentences in the current statute means that any violation of Section 924(c)(1) is punishable by life imprisonment. Firearm type in the current version of the statute ensures a level of punishment within that range, but leaves an offender's maximum exposure unaffected.

For all the reasons previously provided, the rule of lenity does not apply here. "The mere possibility of articulating a narrower construction * * * does not by itself make the rule of lenity applicable." *Smith*,

508 U.S. at 239. Rather, the rule of lenity applies only if there is a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citation omitted). There is no "grievous ambiguity" here. To the contrary, firearm type is unambiguously a sentencing factor in the current statute because the statute states that firearm type bears only on how "a person convicted of a violation" is to "be sentenced," 18 U.S.C. 924(c)(1)(B) and (B)(ii), and because the provision as a whole is structured to separate the offense elements in the principal paragraph of Section 924(c)(1)(A) from the sentencing factors in the balance of the statute.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BENJAMIN J. HORWICH
Assistant to the Solicitor General
SANGITA K. RAO
Attorney

NOVEMBER 2009

APPENDIX

1. 18 U.S.C. 924(c)(1) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the

person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

2. 18 U.S.C. 924(c)(1) (Supp. V 1993) provided:

Penalties

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle,[1] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release.[] Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

---

[1] So in original. The comma probably should be "or a".

3. 18 U.S.C. 2119 (Supp. V 1993) provided:

Motor vehicles

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

RESPONDENT'S BRIEF

(6)

No. 08-1569

Supreme Court, U.S.
FILED
JAN 14 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT ARTHUR BURGESS

JEFFREY T. GREEN
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LESLIE FELDMAN-RUMPLER
Counsel of Record
101 Tremont Street
Suite 708
Boston, MA 02108
(617) 728-9944

TACY F. FLINT
JEREMY G. MALLORY
SEAN A. SIEKKINEN
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Respondent Arthur Burgess

January 14, 2010

[Additional Counsel Listed on Inside Cover]

BOTH 5BV8HO

58e

26

JUDITH H. MIZNER
ASSISTANT FEDERAL
PUBLIC DEFENDER
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
DISTRICT OF MASSACHUSETTS
51 Sleeper Street, 5th Floor
Boston, MA 02110
(617) 223-8061

QUESTION PRESENTED

In *Castillo* v. *United States*, 530 U.S. 120 (2000), this Court unanimously held that, under a previous version of 18 U.S.C. § 924(c)(1), firearm type was an offense element that had to be proven to a jury beyond a reasonable doubt, when a finding that the firearm was a machinegun increased the mandatory consecutive sentence from five to thirty years. The question presented in this case is whether, under the statute as amended in 1998, firearm type remains an offense element when a finding that the firearm is a machinegun increases the mandatory minimum consecutive sentence from five to thirty years.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL PROVISIONS INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. SECTION 924(c)(1)(B) DEFINES MACHINEGUN POSSESSION AS A SEPARATE CRIME	10
A. The Language And Structure Of The Amended Statute Support The Conclusion That § 924(c)(1)(B) Describes An Offense Element	11
B. The Nature And Traditional Treatment Of A Specific Factor And Whether Steeply Higher Penalties Result From The Presence Of That Factor Are Controlling	21
II. THE GOVERNMENT'S INTERPRETATION OF § 924(c)(1)(B) IS INCONSISTENT WITH CONSTITUTIONAL REQUIREMENTS	29
A. Constitutional Limitations Prevent Congress From Relabeling Elements As Sentencing Factors	31

TABLE OF CONTENTS—continued

Page

B. This Court's Decision In *Harris* Is Not To The Contrary 36

C. To The Extent *McMillan* and *Harris* Would Permit The Government's Interpretation, They Should Be Overturned 36

D. Reading § 924(c)(1)(B) To Contain Sentencing Factors Would Violate The Respondents' Fifth And Sixth Amendment Rights In This Case 40

CONCLUSION 43

APPENDIX 1a

18 U.S.C. § 924(c) 1a

TABLE OF AUTHORITIES

CASES Page

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 14
Bailey v. *United States*, 516 U.S. 137 (1995) 1
Blakely v. *Washington*, 542 U.S. 296 (2004) 30, 31, 42
Castillo v. *United States*, 530 U.S. 120 (2000) ..... *passim*
Corley v. *United States*, 129 S. Ct. 1558 (2009) 12
CTS Corp. v. *Dynamics Corp. of Am.*, 481 U.S. 69 (1987) 38
Cunningham v. *California*, 549 U.S. 270 (2007) 26, 42
Dean v. *United States*, 129 S. Ct. 1849 (2009) 18, 20, 29
Finley v. *United States*, 490 U.S. 545 (1989) 16, 27
Gall v. *United States*, 552 U.S. 38 (2007) 25, 36, 40, 42
Harris v. *United States*, 536 U.S. 545 (2001) ..... *passim*
In re Ondras, 846 F.2d 33 (7th Cir. 1988) ... 17
In re Winship, 397 U.S. 358 (1970) 31
Jones v. *United States*, 526 U.S. 227 (1999) ..... *passim*
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) ..... *passim*
Merrill Lynch v. *Dabit*, 547 U.S. 71 (2006) 12
Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 10, 31, 32
Rita v. *United States*, 551 U.S. 338 (2007) 40, 41, 42

TABLE OF AUTHORITIES—continued

Page

Staples v. *United States*, 511 U.S. 600 (1994) 22
United States v. *Alaniz*, 235 F.3d 386 (8th Cir. 2000) 28
United States v. *Avery*, 295 F.3d 1158 (10th Cir. 2002) 20
United States v. *Gamboa*, 439 F.3d 796 (8th Cir. 2006) 20
United States v. *Gradwell*, 243 U.S. 476 (1917) 29
United States v. *Harrison*, 272 F.3d 220 (4th Cir. 2001) 19
United States v. *Sandoval*, 241 F.3d 549 (7th Cir. 2001) 19, 20
United States v. *Santos*, 128 S. Ct. 2020 (2008) 29
United States v. *Studifin*, 240 F.3d 415 (4th Cir. 2001) 28
United States v. *Tidwell*, 521 F.3d 236 (3d Cir.), *cert. denied*, 129 S. Ct. 762 (2008)... 17, 18
Zadvydas v. *Davis*, 533 U.S. 678 (2001)..... 31

STATUTES AND CODES

18 U.S.C. § 521 ..... 12, 17
§ 831 17
§ 921(23) 4
§ 922 ..... 3, 22
§ 924 ..... *passim*
§ 1201(a) 25, 26
§ 1951 3
§ 2113 ..... 12, 13
§ 2241 26
§ 2251 26

TABLE OF AUTHORITIES—continued

	Page
§ 2252	26
§ 2421	26
§ 2423	26
§ 2511	13
21 U.S.C. § 841(b)	18
§ 848	12, 17, 25, 26
§ 861(b)	13
26 U.S.C. § 5845	4, 22
D.C. Code Ann. § 22-4514	22
Mass. Gen. Laws Chapter 265, § 26A (1933)	26
Ohio Rev. Code Ann. § 2905.01(A)(4) (2009)	26
Ohio Rev. Code Ann. § 2923.11(K),	22
Ohio Rev. Code Ann. § 2923.17(A)	22
Or. Rev. Stat. § 166.272	22
R.I. Gen. Laws § 11-26-1.4 (1956)	26
Utah Code Ann. § 76-5-301 (1953)	26
Wash. Rev. Code Ann. § 9.41.190	23

LEGISTLATIVE HISTORY

143 Cong. Rec. S405 (1997)	27
144 Cong. Rec. H10330-01 (1998)	27, 28
144 Cong. Rec. S12670 (1998)	28
H.R. Rep. No. 105-344 (1997)	27

OTHER AUTHORITIES

U.S. Sent'g Comm'n, *Monitoring of Criminal Sentences, 2008* (2009)	41
U.S.S.G. § 2A3.1(b)(4)	23
U.S.S.G. § 2A4.1(b)(2)	23
U.S.S.G. § 2B3.1(b)(3)	23
U.S.S.G. § 2K2.1(b)(5)	23

TABLE OF AUTHORITIES—continued

Page

U.S.S.G. § 2K.2.4 ..... 25, 36
U.S.S.G. § 5K2.2 23

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . and to be informed of the nature and cause of the accusation.

Section 924(c) of Title 18 of the United States Code is reproduced in an appendix to this brief.

INTRODUCTION

When Congress amended 18 U.S.C. § 924(c) in 1998 to address the effect of *Bailey* v. *United States*, 516 U.S. 137 (1995), on "use and carry offenses," it reorganized the statute but did not reduce firearm type to a sentencing factor. In construing the prior version of the statute in *Castillo* v. *United States*, 530 U.S. 120 (2000), the Court unanimously held that firearm type was an element of the offense set forth in § 924(c), consistent with past practice and with the Court's view of the nature of firearm type. *Id.* at 131. The reasoning of *Castillo* still applies to this case. The Court's decision in *Harris* v. *United States*, 536 U.S. 545 (2001), on its own terms, neither applies to the provisions at issue here nor to the special punishment imposed.

Two features of the amended statute's language and structure make this clear. *First*, the introductory language of subparagraph (B) of § 924(c)(1), concerning a conviction of a violation "of this subsection," refers to § 924(c) as a whole, and not solely subparagraph (A). Thus, the additional elements introduced in subparagraph (B), which are part of the offense described in "this subsection," are just that: elements of an aggravated offense. *Second*, Congress's decision to separate firearm type from brandishing and discharging, placing the latter in clauses (ii) and (iii) of subparagraph (A) and the former in subparagraph (B), strongly supports the conclusion that firearm type is an element. It indicates that Congress differentiated firearm type, which this Court has said goes to the heart of the offense, from other facts that this Court has previously held are sentencing factors.

The amendments made only one substantive change to the sentence where the firearm is a machinegun: the thirty-year mandatory sentence from the prior version became a thirty-year mandatory minimum sentence in the amended one. By any measure, the increase from a mandatory minimum sentence of five years to one of thirty years is significant.

The government's construction of § 924(c) also raises grave and doubtful constitutional questions about the deprivation of jury trial and due process rights. Those concerns are not eliminated by the addition of three words—"not less than"—to prescribe an entirely new level of punishment based upon judge-found facts on a preponderance standard. The government's policy concerns, which were never expressed by Congress in enacting the 1998 amendments, also do not provide an answer.

Streamlining guilt-stage proceedings may solve the claimed problems of proof, but the Constitution does not tolerate a shortcut to judgment at the expense of defendants' rights.

STATEMENT OF THE CASE

The defendants pled guilty to a § 924(c) charge with no admission that any of the firearms involved was a machinegun. J.A. 39-42, 56. They admitted at the Rule 11 colloquy that a firearm was brandished. *Id.* at 43. At sentencing, the government moved for an upward departure pursuant to § 5K2.6 of the United States Sentencing Guidelines, based on the dangerousness of the weapons. J.A. 47; see also Gvt. C.A. App. 209, 231-32. But, despite its advocacy for a thirty-year mandatory minimum sentence based on firearm type, the government chose to recommend a twelve-year sentence on the § 924(c) count. Gvt. C.A. App. 209. Twelve years was five years above the applicable mandatory minimum for brandishing under § 924(c)(1)(A), and eighteen years below the thirty-year sentence the government now seeks to impose post-judgment through statutory interpretation.

Trial Court Proceedings

The defendants were charged in July 2005 with, *inter alia*, Hobbs Act violations, 18 U.S.C. § 1951, and using, carrying, and/or possessing firearms in furtherance of a crime of violence, 18 U.S.C. § 924(c). J.A. 19-21. Prosecutors alleged that Dennis Quirk, Jason Owens, Martin O'Brien, and Arthur Burgess conspired and attempted to rob an armored car as it made a scheduled delivery of cash to a bank in the

North End of Boston, Massachusetts.[1] *Id.* The indictment identified three firearms involved in the offense: an AK-47, a Sig-Sauer, and a Cobray pistol. *Id.*

The case was set for trial on April 2, 2007. Five weeks earlier, prosecutors had obtained a second superseding indictment, adding a second § 924(c) count, Count IV, to allege that the Cobray pistol was a "machinegun" for purposes of § 924(c).[2] J.A. 9, 20-21. The Cobray remained one of the three firearms identified in Count III, in which § 924(c) was originally charged. *Id.* at 19-21.

Defense counsel moved to strike the Cobray from Count III, asserting that firearm type was an element of the § 924(c) offense and therefore properly charged only in a separate count, as it was in Count IV. *Id.* at 10. Prosecutors responded that the government would move to dismiss Count IV, regardless of which way the court ruled. *Id.* at 51-52. They reasoned that, if the District Court agreed with the government that firearm type was not an offense element, then Count IV was unnecessary. *Id.* If,

---

[1] Mr. Owens, Mr. Burgess, and Mr. Quirk were also charged with possession of a firearm by a previously convicted felon in violation of 18 U.S.C. § 922(g)(1). J.A. 19-21.

[2] The term "machinegun" is defined for purposes of § 924(c)(1)(B)(ii) as "any weapon which shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger." 18 U.S.C. § 921(23); 26 U.S.C. § 5845(b). This definition does not include firearms that fire in semiautomatic mode, as they automatically chamber additional rounds, but require additional pulls of the trigger to fire. Pet App. 2a n.1. Notably, the presentence report states, "The Cobray, however, although originally manufactured to fire in semi-automatic mode, in fact fired fully automatically *when test-fired at the FBI Laboratory*." J.A. 45 (emphasis added).

however, the District Court concluded that firearm type was an offense element, they conceded that Count IV was not viable because the government could not prove that the defendants had known that the Cobray pistol was a "machinegun." *Id.*

On the day trial was to begin, the District Court agreed with the defendants and held that firearm type was an element. *Id.* at 39-42, 56. Prosecutors then moved to dismiss Count IV, which the District Court granted. *Id.* The defendants subsequently changed their pleas to guilty to the remaining charges (without plea agreements). *Id.* They acknowledged their understanding that the mandatory minimum sentence on the § 924(c) count was seven years, as a firearm was brandished during the robbery attempt. *Id.* at 43. The defendants made no admission in any form that any of the firearms was a machinegun.[3] *Id.*

Prosecutors made a written objection to the District Court's ruling that firearm type is an offense element. *Id.* at 45-48. But at sentencing they never asked the District Court to sentence the defendants to the thirty-year mandatory minimum term set forth in § 924(c)(1)(B)(ii) for use of a "machinegun." *Id.* Instead, they moved for an upward departure and recommended that Mr. Burgess and Mr. O'Brien each receive a twelve-year sentence on the § 924(c) count,

---

[3] Prosecutors described the Cobray at the plea hearing only as a "9 millimeter pistol" and a "real firearm." Gvt. C.A. App. 179-80. At sentencing, prosecutors admitted that "there's nothing on [the Cobray] that says, 'I am a machinegun' or 'I fire in automatic mode,' but the fact of the matter is that it does." J.A. 48.

to run consecutively to the sentences on the other counts.[4] *Id.*; see also Gvt. C.A. App. 209.

The District Court sentenced Mr. Burgess to a consecutive seven-year sentence on the § 924(c) count, for a total sentence of twenty-two years. Gvt. C.A. App. 51-56, 232-48. It likewise sentenced Mr. O'Brien to a consecutive eight-and-one-half-year sentence on that count, for a total sentence of fifteen years. *Id.* The sentencing court made no finding as to whether the Cobray fired in fully automatic mode at the time of the offense, and prosecutors made no request for a finding on that issue.[5] *Id.*; see also J.A. 45-48.

First Circuit Appeal

The First Circuit subsequently affirmed the District Court's judgment. Applying the factors set forth in *Jones* and *Castillo*, and citing *Harris*, it observed that, "[r]ead in a vacuum, the language of [§] 924(c) indicates that the offense is defined as the use, carriage, or possession of a firearm during a drug or violent felony, and that brandishing, discharge, and

---

[4] The sentencing judge invited the government to make a recommendation as to a "reasonable" sentence on the § 924(c) charge. Gvt. C.A. App. 207-09. The prosecutor responded: "[T]he government's recommendation, in terms of a concrete number, [is] for an additional 60 months for each defendant on the 924C charge." *Id.* "[I]n this case we're seeking a total of 12 years to run consecutively with respect to Count 3." *Id.*

[5] Because prosecutors never requested—and the sentencing court never made—a finding that the firearm was a "machinegun," there would be no basis to impose the thirty-year mandatory minimum sentence under § 924(c)(1)(B) even if the judgment below is reversed and that provision is deemed to set forth sentencing factors rather than offense elements. For that reason, dismissal of the petition as improvidently granted may be warranted.

the type of firearm are all sentencing factors." Pet. App. 5a. However, the First Circuit refused to read the statute in a vacuum, based on this Court's precedent. See *id.*

The First Circuit looked to *Castillo*. Suggesting that the language and structure of the prior version of the statute were slightly more favorable to the government's interpretation, it viewed the changes as falling short of a clear statement of congressional intent to make firearm type a sentencing factor. *Id.* at 5a-10a. "It would be a different matter," the panel remarked, "if Congress had explained the change as one aimed at *Castillo* itself; but *Castillo* was decided after the new statute had been passed." *Id.* at 10a.

The First Circuit viewed the change to a multi-subpart structure as part of a recent trend in statutory drafting. *Id.* The only substantive change, it noted, was the conversion of fixed sentences to mandatory minimums of the same length. *Id.* It concluded that these changes did not amount to a clear statement of congressional intent to change the status of firearm type.

SUMMARY OF ARGUMENT

In holding the firearm types specified in § 924(c)(1)(B) to be offense elements, the First Circuit followed the language and structure of the statute rather than the flawed interpretations of the opinions of several other courts of appeals which have interpreted the statute. There is no evidence in the statute itself or the legislative history of the 1998 amendments that Congress intended to change firearm type—a traditional offense element—into a mere sentencing factor. The First Circuit rightly refused to infer a substantive change of such

constitutional dimension from the stylistic reorganization of the statute's text. The contrary conclusion reached by other courts is based on a misreading of the statute's structure and a cursory analysis of the amended statute that elevates form over substance and ignores other relevant criteria articulated by this Court.

If Congress intended § 924(c)(1)(B) to define sentencing factors relevant to a predicate conviction under § 924(c)(1)(A), the introductory phrase of subparagraph (B) would specifically refer to the previous subparagraph as a complete, standalone offense, as penalty provisions typically do. Instead, § 924(c)(1)(B) refers more generally to a violation of "this subsection"—meaning § 924(c) as a whole—thus encompassing the firearm characteristics in subparagraph (B) as elements of the offense to which the sentences prescribed in that subparagraph apply. Therefore, contrary to the government's suggestion, the language of subparagraph (B) presumes a finding of guilt not under the previous subparagraph, but rather under subparagraphs (A) and (B) together, supporting the conclusion that subparagraph (B) defines offense elements rather than sentencing factors.

The structure of § 924(c) strengthens, not weakens, this interpretation. The 1998 amendments moved firearm type to an independent subparagraph, separate and apart from the sentencing factors defined in clauses (i) through (iii) of § 924(c)(1)(A). The government suggests, that the location of the firearm-type provisions between sentencing factor subparagraphs means that they too are sentencing factors. This argument rests on the assumption that statutes conform to a formula whereby elements are listed first, followed by sentencing factors. That

assumption is contradicted by the reality, both in § 924(c) and elsewhere in the criminal statutes.

The nature and traditional treatment of firearm type further suggest that subparagraph (B) sets forth offense elements. This Court observed in *Castillo* that firearm type is a traditional offense "element," which lies close to the heart of the crime. 530 U.S. at 126-27. The fact that § 924(c) was amended in no way diminishes the significance of this observation. Nor does it diminish the stark disparity of the six-fold increase from five to thirty years in prison for possession of a machinegun, which *Castillo* emphasized in holding that firearm type is an offense element.

The government's attempt to dismiss this disparity on grounds that a sentencing judge technically has discretion to impose a sentence of thirty years regardless of firearm type ignores the reality of sentencing. The sentencing guidelines, reasonableness review, and common practice ensure that the minimum sentences prescribed by § 924(c) roughly define defendants' actual sentences in most cases. The length and severity of the punishments prescribed by § 924(c)(1)(B) drastically exceed the sort of incremental enhancements which this Court has deemed sentencing factors, to such a degree that firearm type would become the tail wagging the dog of the substantive offense were it construed as a sentencing factor. The foregoing factors cumulatively indicate that firearm type is an element of the offense that must proven to a jury, and to the extent there is any doubt the rule of lenity dictates that this Court err in favor of the defendant.

Even ignoring these considerations, the doctrine of constitutional avoidance precludes the government's proffered interpretation of the statute. It is well

established that Congress cannot circumvent constitutional guarantees simply by relabeling a fact necessary for conviction a sentencing factor. *E.g.*, *Mullaney* v. *Wilbur*, 421 U.S. 684, 698 (1975). Congress cannot, consistent with the Fifth and Sixth Amendments, eviscerate the need for a jury or proof beyond a reasonable doubt on the issue of whether a firearm is a "machinegun" for purposes of § 924(c). *E.g.*, *Jones* v. *United States*, 526 U.S. 227, 239-50 (1999). The government's brief is conspicuously silent on this obvious constitutional issue, which has been acknowledged by this Court in several fractured opinions, including *Harris*. See 536 U.S. at 556-68.

ARGUMENT

I. SECTION 924(c)(1)(B) DEFINES MACHINEGUN POSSESSION AS A SEPARATE CRIME.

In three cases decided between 1999 and 2002, *Jones*, *Castillo*, and *Harris*, this Court established an analytical framework to answer the question presented here: namely, whether a statutory provision describes an offense element or a sentencing factor where the statute does not expressly delegate the factfinding function to either judge or jury. *Harris*, 536 U.S. at 552-56; *Castillo*, 530 U.S. at 123-31; *Jones*, 526 U.S. at 232-39; see also *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). In all three cases, language and structure were starting points for this Court's analysis, but they were never the sole factors determining the outcome. *E.g.*, *Castillo*, 530 U.S. at 123-31. The Court identified other, specific factors as critical to the analysis, most importantly: the nature and traditional treatment of the fact at issue, and the impact on sentencing. *Id.* Other factors were also

considered, including legislative history and the rule of lenity. *Id.* Each of these factors indicates that the firearm-type provisions in § 924(c)(1)(B) remain, as they were before the 1998 amendments, offense elements.

A. The Language And Structure Of The Amended Statute Support The Conclusion That § 924(c)(1)(B) Describes An Offense Element.

1. The Language Of § 924(c) Supports The Conclusion That Congress Intended To Keep Firearm Type As An Offense Element In The 1998 Amendments.

Two words in the introductory phrase of § 924(c)(1)(B) provide a clear signal that the firearm-type provisions contain elements: "[i]f the firearm possessed by a person convicted of a violation of *this subsection* . . . ." 18 U.S.C. § 924(c)(1)(B). The question for this Court is what the words "this subsection" mean in that phrase. As explained below, these words refer to § 924(c) as a whole and not only to § 924(c)(1)(A). It follows that the firearm-type provisions contained in § 924(c)(1)(B) express elements, as they are within "this subsection" which is § 924(c).

Section 924 consistently refers to three major divisions within the statute: "chapter," "section," and "subsection." *E.g.*, *id.* § 924(a)(1)(A). "Chapter" refers to "Chapter 44—Firearms" comprising "sections" 921 through 993, each containing various firearms prohibitions. *E.g.*, *id.* The term "subsection" refers to each of the lower case, lettered divisions of each section. The first sentence of § 924(a)(1), for example, specifies that, "[e]xcept as otherwise

provided *in this subsection, subsection (b), (c), (f), or (p) of this section*." *Id.* § 924(a)(1) (emphasis added).

Both congressional consistency and the use of this phrase elsewhere in the statute indicate that Congress made a conscious choice to use "this subsection" in subparagraph (B) to refer to § 924(c), rather than to § 924(c)(1)(A) alone. Any other reading runs contrary to interpretive doctrine. See *Merrill Lynch* v. *Dabit*, 547 U.S. 71 (2006) (where the same words are used within a statute, they are presumed to have the same meaning).

If the words "this subsection" were read to refer only to § 924(c)(1)(A), the first sentence of § 924(c)(5) would be superfluous. See *Corley* v. *United States*, 129 S. Ct. 1558 (2009). That paragraph provides for sentences of fifteen years and higher, "[e]xcept to the extent that a greater mandatory minimum sentence is otherwise provided under *this subsection* or by any other provision of law." 18 U.S.C. § 924(c)(5). If "this subsection" were to mean § 924(c)(1)(A), the first sentence of paragraph (5) would serve no purpose, because the sentences provided in § 924(c)(1)(A) are all less than fifteen years. See *id.* § 924(c)(1)(A)(i)-(iii).

Other statutory references to violations of a particular provision of law confirm that Congress typically makes express citation to a specific subsection, paragraph, or subparagraph—unless Congress intends to refer to the larger chapter, section, or subsection. See, *e.g.*, 21 U.S.C. § 848(i), (j), (n) (repealed 2006) (referring to "an offense *under subsection (e)* of this section") (emphasis added); 18 U.S.C. § 521(b) ("Penalty—The sentence of a person convicted of an offense described in *subsection (c)* shall be increased by . . . .") (emphasis added); *id.* § 2113(d) ("Whoever, in committing, or in attempting

to commit, any offense defined in *subsections (a) and (b)* of this section, assaults any person. . . .") (emphasis added); cf. *id.* § 2113(e) ("Whoever, in committing any offense defined in this *section*. . . ."); *id.* § 2511(5)(a)(ii)(A) ("if the violation of this chapter is a first offense for the person *under paragraph (a) of subsection (4)*"); 21 U.S.C. § 861(b) ("Penalty for first offense—Any person who violates *subsection (a)* of this section is subject to . . . .") (emphasis added). Congressional references to various statutory provisions are therefore specific and clear. There is thus no reason to infer that Congress meant something narrower than the whole of § 924(c) when it referred in § 924(c)(1)(B) to a person "convicted of a violation of this subsection."

The government's own choice of words in referring to the various parts of this statute is consistent with ordinary practice, and inconsistent with the interpretation of this phrase that it implicitly urges on the Court. It consistently refers to subparagraphs (A), (B), and (C) not as subsections, but as subparagraphs. See Gov. Br. 9, 18; see also *id.* at 14-15 (referring to "Clauses (B)(i) and (B)(ii)").

The government also suggests that the use of the phrase "shall be sentenced" in the firearm type provisions means that they describe sentencing factors. *Id.* But every criminal statute states the length of the sentence. *E.g.*, 18 U.S.C. § 2113(e). The inclusion of the phrase "shall be sentenced" specifies the enhanced sentence to be imposed after conviction of an aggravated offense. See *Jones*, 526 U.S. at 236. Indeed, this feature of clauses (i) and (ii) of § 924(c)(1)(B) distinguishes them from their counterparts in clauses (ii) and (iii) of § 924(c)(1)(A), which contain no "shall" of their own but instead refer back to the one at the end of § 924(c)(1)(A)(i).

That is not to say that the interpretive process is at an end and that the entirety of subsection (c) sets forth offense elements. Section 924(c)(1)(C), for example, refers to recidivist offenders, a factor the Court has found to be traditionally one for the sentencing court alone in light of the due process and jury trial protections already afforded in the course of the earlier conviction. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 241-47 (1998). Similarly, § 924(c)(1)(D) refers only to probation and consecutive sentences—considerations that are unique to the sentencing process itself. Paragraph (5), as noted however, also articulates aggravated versions of the "use or carry" offense—referencing armor-piercing ammunition and death resulting from the use thereof. *Id.* § 924(c)(5).

2. The Structure Of § 924(c)(1)(B) Supports The Conclusion That Congress Intended Firearm Type To Remain An Offense Element In The 1998 Amendments.

Congress's decision to place the firearm type provisions alone in subparagraph (B), apart from the discharging and brandishing provisions contained in clauses (ii) and (iii) of subparagraph (A), further supports the conclusion that firearm type remains an offense element distinct from the sentencing factors listed in subparagraph (A). See *Jones*, 526 U.S. at 232-39. Subparagraph (B) stands alone in the subsection in referring to firearm type: subparagraph (A) refers only to "a firearm" and to how the "firearm" is used. 18 U.S.C. § 924(c)(1). The government's reading would be plausible, though still not definitive, if the substance of clauses (i) and (ii) of § 924(c)(1)(B) appeared instead in § 924(c)(1)(A), as clauses (iv) and (v), after the brandishing and

discharge provisions. But, of course, that is not the statute Congress wrote.

The government makes no mention of the segregation of firearm-type provisions in subparagraph (B). Instead, it resorts to an argument that this Court rejected in *Jones*: namely, that the statute contains a principal paragraph "followed by the word 'shall,' . . . and finally 'separate subsections,'" that specify sentences. Gov. Br. 17. As the *Jones* Court noted, although the word "shall" "frequently separates offense-defining clauses from sentencing provisions, it hardly does so invariably." 526 U.S. at 234 (citing 18 U.S.C. § 2118(a)(3) as but one example). Elements have been located on either side of the word "shall." *Id.*

The government's structural argument has even less weight here, as the word "shall" appears in subparagraph (B), *after* the additional element of firearm type: "[i]f the firearm . . . is a machinegun . . . the person shall be sentenced to a term of imprisonment of not less than thirty years." 18 U.S.C. § 924(c)(1)(B)(ii). Thus, "shall" is not a divider between elements earlier defined and the provisions in subparagraph (B). Even under the government's theory, the use and placement of the word "shall" in subparagraph (B) indicate that the machinegun provision in fact states a separate, aggravated form of the § 924(c) offense.

The Court's decision in *Harris* is limited to the brandishing provision of § 924(c)(1)(A)(ii), see 536 U.S. at 551, and thus offers little support for the government's reading of the subsection as a whole. The Court viewed the structure of § 924(c)(1)(A) as permitting a presumption, though not mandating a conclusion, that Congress intended to make brandishing a sentencing factor. *Id.* at 552-56. Here,

the question arises from the same version of § 924(c)(1), but in a different subparagraph, with its own unique structure. Subparagraph (A) is a run-on sentence with the word "shall" followed by a dash and a series of clauses. 18 U.S.C. § 924(c)(1)(A). The final clause, § 924(c)(1)(A)(iii), ends in a period, bringing § 924(c)(1)(A) to a close. *Id.* Had Congress intended firearm type to be a sentencing factor, like discharging or brandishing, the placement of the firearm type provisions in subparagraph (B)—separated from the sentencing factors in clauses (ii) and (iii) of subparagraph (A)—and the inclusion of the introductory phrase of subparagraph (B) serve no purpose. See *Jones*, 526 U.S. at 232-39.

The First Circuit offered the most cogent explanation for the change from the single-paragraph structure of the prior version of § 924(c) to a series of subparagraphs in the 1998 amendments. Pet App. 8a-10a. It noted that there was no indication that the alteration of the run-on sentence into its present form evidenced "anything more than the current trend—probably for ease of reading—to convert lengthy sentences in criminal statutes into subsections in the fashion of the tax code." *Id.* at 9a. And, as discussed below, the "stated objective of re-writing [§] 924(c)" was *not* to alter the purpose of the statutory language—which was taken from the opening sentence and moved into subparagraphs—but rather "another issue entirely."[6] *Id.*; see also *Finley* v. *United States*, 490 U.S. 545, 549 (1989) ("Under

---

[6] As the First Circuit observed, the debates and hearings surrounding the amendment of the statute were focused on Congress's aim to criminalize "mere" possession of firearms after this Court's decision in *Bailey*, which had held that "use" of a firearm required the government to show active employment of the weapon. *See* Pet App. 9a n.5.

established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'") (quoting *Anderson* v. *Pacific Coast S.S. Co.*, 225 U.S. 187 (1912)). Far from supporting the government's argument that § 924(c)(1)(B) describes a sentencing factor, the structure of the provision strongly suggests that Congress still intended for it to describe an element of the crime, just as this Court in *Castillo* found it did in the prior version of the statute.

3. The Placement Of The Firearm-Type Provisions Between Subparagraphs Containing Sentencing Factors Does Not Indicate Congressional Intent To Make Firearm Type A Sentencing Factor.

The government attaches significance to the location of subparagraph (B) between subparagraphs (A) and (C), where the latter two contain sentencing factors. Gov. Br. 20. This would certainly not be the first time that legislative drafting, a process famously compared with sausage production,[7] has resulted in a jumble of widely varying provisions, as even a cursory survey of federal criminal statutes shows.[8] That is

---

[7] *See, e.g., In re Ondras*, 846 F.2d 33, 36 (7th Cir. 1988).

[8] *See, e.g.*, 18 U.S.C. § 831(a) (elements); *id.* § 831(b) (penalties); *id.* § 831(c) (elements); *id.* § 831(d) (enforcement); *id.* § 831(e) (enforcement); *id.* § 831(f) (definitions); *id.* § 521(a) (definitions); *id.* § 521(b) (penalty); *id.* § 521(c) (defines offenses by reference to other statutes); *id.* § 521(d) (sentencing factors); *see also* 21 U.S.C. § 848(b)(e). In *United States* v. *Tidwell*, 521 F.3d 236 (3d Cir.), *cert. denied*, 129 S. Ct. 762 (2008), cited by the government, the Third Circuit rejected the defendant's argument that 21 U.S.C. § 848(b) must contain elements

true even when those provisions are "organized" into sections, subsections, subparagraphs, and subparts, with letters and numbers large and small. For example, the Controlled Substances Act, despite its clearly labeled subsections captioned "unlawful acts" and "penalties," contains an element sandwiched between sentencing factors: where "death . . . results" from a controlled substance offense, an aggravated offense with increased maximum penalties exists. See 21 U.S.C. § 841(b). Congress often mixes together elements and sentencing factors without intending to blur the distinction between them.

The government's description of the organization of § 924(c) is, moreover, not entirely accurate. See Gov. Br. 20. The claim that subparagraph (B) is surrounded by sentencing factors glosses over the fact that subparagraph (A) contains elements, see 18 U.S.C. § 924(c)(1)(A), and subparagraph (C) contains the same firearm-type references as subparagraph (B), see *id.* § 924(c)(1)(C)(ii).[9] See also *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009).

---

because § 848(e) states an offense. 521 F.3d at 248. The *Tidwell* opinion noted: "'[s]everal other subsections of § 848 refer to § 848(e) as a separate offense.'" *Id.* (quoting *United States* v. *NJB*, 104 F.3d 630, 633 (4th Cir. 1997)).

[9] Most if not all of the cases cited by the government regarding § 924(c)(1)(C), *see* Gov Br 19 n.5, pertain exclusively to § 924(c)(1)(C)(i), which is a recidivism provision. But § 924(c)(1)(C)(ii) combines recidivism and firearm type.

4. The Current Majority Courts Of Appeals View That Firearm Type Is A Sentencing Factor Is Rooted In A Clear Misreading Of The Statute's Structure.

The government suggests that the majority of circuits have applied this Court's approach to statutory interpretation and correctly held that firearm type is a sentencing factor. Gov. Br. 13. To the contrary, the circuit court opinions demonstrate a failure to follow this Court's analytical approach and a fundamental misreading of the amended statute's structure.

The error began with *United States* v. *Sandoval*, 241 F.3d 549 (7th Cir. 2001). The opinion, in a passage relied on by other courts, described the statute as follows:

> [T]he first clause of § 924(c)(1), standing alone, defines the offense . . . while subsections (A) and (B) single out subsets of those persons . . . for more severe punishment.

Id. at 551. In fact, there is no "first clause" of § 924(c)(1) independent of subparagraph (A). The misconstruction is critical. Had § 924(c)(1)(A) and § 924(c)(1)(B) both been subparts of one main paragraph, as *Sandoval* suggests, then the argument that they are structurally similar might have made at least some sense. But they are not: § 924(c)(1)(B) has its own introductory text and its own subparts.

The Fourth Circuit's decision in *United States* v. *Harrison*, 272 F.3d 220 (4th Cir. 2001), reflects similar analytical errors. Noting that the 1998 amendments made the fixed penalties of § 924(c) into mandatory minimums, that court observed:

> [A]s a provision marking out a separate offense, § 924(c)(1)(B) would be incomplete; it sets forth no determinate sentence or even any upper limit on sentencing. It makes sense only as a sentencing factor that cabins a judge's discretion when imposing a sentence for the base offense in [§] 924(c), for which the maximum penalty is life imprisonment.

Id. at 225-26. However, if the absence of an expressly stated maximum sentence makes a statutory provision incomplete, then § 924(c)(1)(A) is incomplete as well—because it also lacks an upper limit on sentencing. See 18 U.S.C. § 924(c)(1)(A). Yet, this Court has concluded that subparagraph (A) contains elements. *E.g.*, *Dean*, 129 S. Ct. at 1853.

These errors are significant because other circuits that have construed the amended version of § 924(c)(1)(B)(ii) have cited to *Sandoval* or *Harrison*, or otherwise relied upon the same flawed reading of the statute. See *United States* v. *Avery*, 295 F.3d 1158 (10th Cir. 2002); *United States* v. *Gamboa*, 439 F.3d 796 (8th Cir. 2006). These courts gave no consideration to the critical factors that ultimately determined this Court's holdings in *Jones*, *Castillo*, and *Harris*. This critical error at the root of the formation of the circuit majority undermines the significance of that majority.

B. The Nature And Traditional Treatment Of A Specific Factor And Whether Steeply Higher Penalties Result From The Presence Of That Factor Are Controlling.

1. Nature And Traditional Treatment.

The nature and traditional treatment of the factual issue was "perhaps the most important [guidepost]" in *Jones*. *Harris*, 536 U.S. at 553. In *Jones*, *Castillo*, and *Harris*, these considerations carried great weight. *Harris*, 536 U.S. at 552-56; *Castillo*, 530 U.S. at 123-31; *Jones*, 526 U.S. at 232-39. Indeed, in each case, the Court's assessment of the traditional treatment of the fact at issue was the same as its conclusion on the ultimate question, whether the provision at issue was an element or a sentencing factor.

In *Jones*, this Court found in federal and state statutes a tradition of treating "serious bodily injury" as an offense element, and held that the Congress had done the same in the carjacking statute. 526 U.S. at 235-236. In *Harris*, this Court held that brandishing, a "paradigmatic sentencing factor," was a question for the sentencing court alone. 536 U.S. at 554. And, in *Castillo*, the Court observed that firearm type has not traditionally been used as a sentencing factor in the context of "use and carry" offenses. 530 U.S. at 126. The Court noted that the difference between various types of firearms, including machineguns and destructive devices, is so great both in degree and kind, that it "concerns the

nature of the element lying closest to the heart of the crime at issue." *Id.* at 126-27.[10]

Congress's treatment of firearm type as an offense element confirms the *Castillo* Court's assessment. Several of the offenses defined in 18 U.S.C. § 922, a section within the same chapter as § 924(c)(1), explicitly make a firearm's characteristics an element.[11] Additionally, the National Firearms Act defines firearm type, including status as a machinegun, as an element with respect to a wide range of violations set forth in 26 U.S.C. § 5861(a) through (j). See 26 U.S.C. § 5845; see also *Staples* v. *United States*, 511 U.S. 600, 602-03 (1994). State legislatures have taken a similar approach.[12] See

---

[10] The *Castillo* Court also considered whether unfairness or confusion would result from submitting the issue of firearm type to a jury rather than a judge, and its answer was no. 530 U.S. at 128. As the lower courts in this case noted, special verdict forms could be used to address any potential problems in this regard.

[11] *See* 18 U.S.C. § 922(a)(4) (prohibiting unlicensed individuals from transporting machineguns, destructive devices, and short-barreled rifles or shotguns in interstate or foreign commerce); *id.* § 922(b)(4) (forbidding licensed individuals from selling or delivering machineguns and similar weapons except as authorized by the Attorney General); *id.* § 922(k) (making it a crime to transport or possess any firearm "which has had the importer's or manufacturer's serial number removed, obliterated, or altered"); *id.* § 922(o) (making it unlawful for any person to "transfer or possess a machinegun"); *id.* § 922(p) (prohibiting certain firearms which are not accurately detected by x-ray devices).

[12] *See, e.g.*, D.C. Code Ann. § 22-4514 (prohibiting unauthorized possession of machineguns, sawed-off shotguns, and other similar weapons); Ohio Rev. Code Ann. §§ 2923.11(K), 2923.17(A) (prohibiting any person from acquiring, having, carrying, or using "dangerous ordnance[s]," including "[a]utomatic or sawed-off firearm[s]"); Or. Rev. Stat. § 166.272

Jones, 526 U.S. at 236 ("[s]tate practice bolsters this conclusion"). Because both Congress and states have routinely treated firearm type as an offense element, this Court's precedents support similar treatment when interpreting § 924(c)(1). Cf. *Jones*, 526 U.S. at 235 (employing similar logic to classification of serious bodily injury).

The government suggests that, despite these observations, the traditional treatment of firearm type changed between 1988 and 1998, creating a different traditional backdrop for this Court's analysis of the statute as amended in 1998.[13] Gov. Br. 22-23. This argument relies on the treatment of firearm type in the United States Sentencing Guidelines. *Id.*

But the Guidelines are not a source on which this Court has relied to determine traditional treatment of a fact. Serious bodily injury—which this Court noted in *Jones* has traditionally been treated as an offense element, 526 U.S. at 234-37—is a sentence enhancer in the Guidelines as well. See, *e.g.*, U.S.S.G. §§ 2A3.1(b)(4), 2A4.1(b)(2), 2B3.1(b)(3), 5K2.2. The Guidelines permit a sentencing court to consider uncharged conduct, including entire offenses, in sentencing within the range authorized by the jury's verdict. See, *e.g.*, *id.* § 2K2.1(b)(5).

(prohibiting the knowing possession of a "machine gun, short-barreled rifle, short-barreled shotgun or firearms silencer"); Wash. Rev. Code Ann. § 9.41.190 (making it unlawful to "manufacture, own, buy, sell, loan, furnish, transport, or have in possession or under control, any machine gun, short-barreled shotgun, or short-barreled rifle").

[13] The government does not suggest that trends in legislation and in the Guidelines in any way undermine this Court's observations in *Castillo* about the nature of firearm type in the context of "use and carry" provisions.

Those provisions were never meant to identify a dividing line between offense elements and sentencing factors. The government's use of the Guidelines as the source of a new "tradition" to supplant the past practice of treating firearm type as an element should be rejected.[14]

2. The Twenty-Five Year, Six-Fold Increase To The Mandatory Minimum Based On A Finding That The Firearm Is A Machinegun Is Not The Type Of Increase Usually Associated With Sentencing Factors.

In *Jones*, *Castillo*, and *Harris*, the impact of the fact at issue on sentencing was another critical factor that assisted this Court in distinguishing offense elements from sentencing factors. *Castillo*, 530 U.S. at 131; see also *Harris*, 536 U.S. at 554; *Jones*, 526 U.S. at 243-44. In each case, the Court gave careful consideration to the "length and severity" of the sentence. *E.g.*, *Castillo*, 530 U.S. at 131. The six-fold, twenty-five year increase triggered by a machinegun finding under the prior version of § 924(c), addressed in *Castillo*, was the most extreme increase of all those considered in these cases. See *id.* After the 1998 amendments, the same factual finding leads to the same increase, except that now the increase applies to a mandatory minimum sentence.

---

[14] *Harris* referred to the "brandishing" and "discharging" provisions of the Guidelines only to highlight the *absence* of a federal tradition of treating those characteristics as offense elements. *See, e.g.*, 536 U.S. at 535-54 ("[T]he Guidelines appear to have been the only antecedents for the statute's brandishing provision. The term 'brandished' does not appear in any [other] federal offense-defining provision.").

The *Harris* majority acknowledged that it might have questioned the inference arising from the statute's structure (that the clauses of § 924(c)(1)(A) identified sentencing factors) "if brandishing or discharging altered the defendant's punishment in a manner not usually associated with sentencing factors." 536 U.S. at 554. But the Court viewed the two-year increase for brandishing as insignificant—or no "higher penalt[y] at all"—based on its view that the seven-year sentence was an available sentencing option even without a finding of brandishing. *Id.*

The same cannot be said of the much steeper increase here. Under § 924(c), there is no Guidelines range; instead, the Guidelines prescribe a sentence fixed at the length of the mandatory minimum set forth in the statute. U.S.S.G. § 2K.2.4. A sentencing court would be hard-pressed to justify an increase of twenty-five years either as an upward departure or as a variance in light of the constraints of 18 U.S.C. § 3553(a). See *Gall* v. *United States*, 552 U.S. 38, 50 (2007) ("We find it uncontroversial that a major departure [from the Guidelines range] should be supported by a more significant justification than a minor one.").

The government observes that two other federal statutes permit similarly severe levels of enhancement based upon purported sentencing considerations. Gov. Br. 26-28 (citing the federal kidnapping statute, 18 U.S.C. § 1201(a) (victim's minor status triggers a twenty-year mandatory minimum sentence), and the criminal enterprise statute, 21 U.S.C. § 848(b) (life sentence for principal status and annual gross receipts of $10 million or more)). These statutes, neither of which has been construed by this Court, do not negate the Court's reliance on the extent of a penalty increase as a

significant factor in determining whether a fact is an element or a sentencing consideration. See *Castillo*, 530 U.S. at 131.

In any event, both of these statutes appear to describe offense elements. As for the kidnapping statute, 18 U.S.C. § 1201(a), a victim's status is both "based on the nature of the offense," *Cunningham* v. *California*, 549 U.S. 270, 295 (2007) (Kennedy, J., dissenting), and a traditional element in other federal provisions, *e.g.*, 18 U.S.C. §§ 2241, 2421, 2423, 2251, 2252, as well as state statutes, *e.g.*, Mass. Gen. Laws ch. 265, § 26A (1933); Ohio Rev. Code Ann. § 2905.01(A)(4) (2009); R.I. Gen. Laws § 11-26-1.4 (1956); Utah Code Ann. § 76-5-301 (1953). The criminal enterprise statute, 21 U.S.C. § 848(b), likewise "inarguably . . . refers to behavior which the legislature intended to prohibit." *McMillan*, 477 U.S. at 95 (Stevens, J., dissenting). "As a consequence, the prohibited conduct had to be established by proof beyond a reasonable doubt." *Id.*

Unlike the brandishing or discharging provisions discussed in *Harris*, use of a machinegun alters the defendant's punishment significantly, in a way not usually associated with sentencing factors. See *Harris*, 536 U.S. at 554. It does not present the type of incremental penalty increases which *Harris* described as those one would expect to find in provisions aimed at identifying sentencing matters for a judge to consider. See *id.* In fact, the same extreme degree of increase exists in this case as existed in *Castillo*. See 530 U.S. at 131. This staggering increase counsels strongly against the single-crime interpretation.

3. The Legislative History Of The 1998 Amendments Supports Reading § 924(c)(1)(B) As Setting Forth Offense Elements.

This Court has recognized that, "[u]nder established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley*, 490 U.S. at 549 (quoting *Anderson*, 225 U.S. 187). There is no indication from the legislative history surrounding § 924(c) that Congress intended, in the 1998 amendments, to change the firearm-type provisions from offense elements into mere sentencing factors.

To the contrary, Congress's clear intent in promulgating the 1998 amendments was to reverse the impact of this Court's decision in *Bailey*, and to increase penalties for § 924(c) violators. The amending bill was known as the "*Bailey* Fix Act" in the Senate, and legislators in both houses noted that the legislation was in response to this Court's "invitation" in *Bailey* "to make clear that possession [of a firearm] alone does indeed trigger liability [under § 924(c)]." 143 Cong. Rec. S405 (1997) (Sen. Helms). The committee report noted that the bill "provides for an increased mandatory penalty for any person who possesses brandishes or discharges a firearm during and in relation to the commission of a federal crime of violence or drug trafficking crime." H.R. Rep. No. 105-344, at 2 (1997).[15] Nothing in the

---

[15] *See also* 144 Cong. Rec. H10330-01 (1998) (Rep. Myrick) "In the 1995 case of *Bailey* v. *United States* . . . the Supreme Court interpreted the word "carry" in the Federal criminal code to mean that a felon must fire or brandish his weapon. This is

congressional records suggests any intent to change firearm type from an element of an offense to a sentencing factor.

Lower courts have interpreted the changes in structure incorporated in the 1998 amendments in a similar fashion. The division of the statute into subprovisions was not, these courts have recognized, intended to alter the meaning or effect of the statutory language but were necessary to accommodate the addition of the "brandishing" and "discharging" provisions as sentencing factors. *E.g.*, *United States* v. *Alaniz*, 235 F.3d 386, 388 (8th Cir. 2000) ("Because of this increase in sentencing possibilities, Congress divided what was already a lengthy subsection into distinct subdivisions."); see also *United States* v. *Studifin*, 240 F.3d 415 (4th Cir. 2001) (same). The lower courts also agree that the central purpose behind the 1998 amendments was to broaden the reach of the statute in the wake of this Court's decision in *Bailey*. See, *e.g.*, *Alaniz*, 235 F.3d at 386-89; *Studifin*, 240 F.3d at 420.

---

clearly contrary to Congress's intent, and it has resulted in the early release of hundreds of dangerous criminals. To put a stop to this mess, S. 191 clarifies that a criminal who possesses a gun while committing a violent crime or a drug crime will face a mandatory sentence. And at the same time, the bill increases the mandatory sentence for such crimes."); 144 Cong. Rec. H10330-01 (1998) (Rep. McCollum) ("This legislation clarifies Congress' intent as to the type of criminal conduct which should trigger the statute's application. The bill strikes the now unworkable 'use or carry' element of the statute, and replaces it with a *structure which allows the penalty enhancement for possessing, brandishing, or discharging* a firearm during and in relation to a Federal Crime of violence or drug trafficking crime.") (emphasis added); 144 Cong. Rec. S12670 (1998) (Sen. DeWine) ("This legislation will provide enhanced mandatory minimum penalties for those criminals who use guns while trafficking in drugs or in commission of violent crimes.").

This Court recognized in *Castillo* that the pre-1998 legislative history of § 924(c) suggests that "Congress believed that the 'machinegun' and 'firearm' provisions would work similarly"—as separate offenses. 530 U.S. at 130. This history is not superseded by anything in the record of the 1998 amendments and therefore supports the conclusion that firearm type was intended to remain an element of a separate offense.

* * *

Mr. Burgess submits that § 924(c)(1)(B)(ii) contains elements of an aggravated offense. Even if the foregoing analysis leaves uncertainty as to the meaning of § 924(c)(1)(B)(ii), ambiguous criminal statutes are to be construed in favor of the accused. *Castillo*, 530 U.S. at 131: see also *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality); *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917). That is particularly true where, as here, a twenty-five year increase to a mandatory minimum sentence is involved, see *Dean*, 129 S. Ct. at 1860 (Breyer, J., dissenting), and where the government's competing construction cannot be squared with constitutional limitations.

II. THE GOVERNMENT'S INTERPRETATION OF § 924(C)(1)(B) IS INCONSISTENT WITH CONSTITUTIONAL REQUIREMENTS.

Any remaining doubt over the meaning of § 924(c) must, in any event, be resolved against the government. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," the Court's duty is to adopt the latter. *Jones*, 526 U.S. at 239 (quoting

United States v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

By urging the Court to adopt an interpretation of § 924(c)(1)(B) that would abrogate much of this Court's reasoning in *Castillo*, the government raises a series of grave and doubtful constitutional questions that were avoided by the statutory ruling in that case. The government's brief nowhere addresses these questions, which are so often a feature of this Court's analysis in similar cases. And, as the government construes the statute, it would be clearly unconstitutional. It would relabel elements as sentencing factors, evading indictment, jury, and proof requirements contrary to prior opinions of this Court.

The government makes the stunning suggestion that the Court should respect what it characterizes as Congress's choice to treat use of a machinegun as a sentencing factor, because doing so would "simplif[y] and streamline[] guilt-stage proceedings without interfering with the accuracy of fact-finding." Gov. Br. 33. This desire on the part of prosecutors to clear the path to guilt and to higher sentences with as little an evidentiary burden as possible is one of the dangers against which the Constitution protects. The Court's "decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely* v. *Washington*, 542 U.S. 296, 313 (2004); see also *Jones*, 526 U.S. at 246 ("[L]et it be again remembered, that . . . little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.") (quoting Blackstone). Instead, "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at

313 (emphasis in original). The Court should reject the government's construction and thereby avoid the constitutional questions that necessarily arise.[16]

A. Constitutional Limitations Prevent Congress From Relabeling Elements As Sentencing Factors.

Congress cannot relabel "the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney* v. *Wilbur*, 421 U.S. 684, 698 (1975); *In re Winship*, 397 U.S. 358 (1970). Otherwise, Congress would have unbridled power to deprive defendants of their Fifth and Sixth Amendment rights by redefining crimes, allowing judges to find the facts that constitute the offense by a preponderance of the evidence. *McMillan*, 477 U.S. at 86; *Jones*, 526 U.S. at 242; see also *Harris*, 536 U.S. at 550. "Once a [legislature] defines a criminal offense, the due process clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt." *McMillan*, 477 U.S. at 96 (Stevens, J., dissenting).

1. Firearm type has been an element of a § 924(c) offense from the time it was introduced into the statute, and it is by nature a component of the prohibited transaction, "lying closest to the heart of the crime at issue." *Castillo*, 530 U.S. at 126-27.

---

[16] *See also Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001) ("'[I]t is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

"The difference between carrying, say, a pistol and carrying a machinegun . . . is great, both in degree and kind." *Id.* at 126. Thus, a finding that the firearm possessed was a machinegun (or other form of specialized weapon or destructive device) results in a special stigma: the government, for example, characterizes such weapons as "some of the most dangerous and threatening weapons available." Gov. Br. 31. It also results in a special punishment: in the words of the government, "the difference between sentencing a defendant under the machinegun enhancement of § 924(c), or merely under the brandishing enhancement of the statute, is 23 years of mandatory incarceration." J.A. 52. That difference is comparable to the one in *Mullaney*—twenty years for manslaughter and life for murder—which was held to prohibit reclassification of the element as a mere sentencing factor. See 421 U.S. at 698.

The issue here, then, is not purely one of statutory construction. Even if in 1998 Congress had somehow intended to do what the government claims was accomplished—the relabeling of what was formally (and traditionally) an element of the offense into a separate fact for the sentencing court to find—the Court's precedents nonetheless require consideration of whether the practical effect of having done so is consonant with the requirements of the Fifth and Sixth Amendments. *E.g.*, *id.* "[T]he substantiality of the jury claim is evident from the practical implications of assuming Sixth Amendment indifference to treating a fact that sets the sentencing range as a sentencing factor, not an element." *Jones*, 526 U.S. at 243 (footnote omitted).

2. Here, the practical implication of constitutional indifference is untenable. Prosecutors openly conceded that they had to dismiss Count IV because

they could not prove beyond a reasonable doubt that Mr. Burgess or Mr. O'Brien knew that the Cobray was a machine gun. J.A. 51-52. And, in pleading guilty, neither made such an admission. *Id.* at 43. At sentencing, prosecutors recommended a twelve-year sentence for both Mr. Burgess and Mr. O'Brien—even though they would later seek a thirty-year sentence on appeal, where they would use their admitted lack of evidence on *mens rea* to support an argument rather than let it be the reason why they would have lost in the trial court. See *supra* note 4. No more patent demonstration of the practical implications of constitutional indifference can be imagined.

These constitutional concerns do not disappear simply because the twenty-five-year sentence increase is now to a mandatory minimum rather than a fixed sentence. In *McMillan*, this Court acknowledged that Congress cannot circumvent constitutional guarantees of due process, notice, and jury trial by relabeling long-recognized offense elements as sentencing factors. 477 U.S. at 88. One critical question for the Court was whether the judicially determined sentencing factor gave the "impression of having been tailored to permit [it] to be a tail which wags the dog of the substantive offense." *Id.* Here, § 924(c)(1)(B)(ii), if read as a sentencing factor alone, gives precisely that impression. The five-year term of imprisonment resulting from a jury verdict on § 924(c)(1)(A) is dwarfed by the six-fold increase based on a judicial finding that the firearm was a machinegun. See *Castillo*, 530 U.S. at 123-31. Further, the factual question without which 84 percent of the sentence could not be imposed would be answered by a judge on only a preponderance of the evidence. According to the government, there would be no consideration of

whether the defendant knew the nature of the firearm. The jury's role would be reduced to that of a gatekeeper, reaching only a general verdict that then enables the judge to make the finding on firearm type that would, in a much more practical sense, determine the defendant's fate. See *id.* Firearm type thus becomes the tail that wags the dog of the § 924(c) offense.

3. Resort to *McMillan* and the rhetoric of mandatory minimum sentencing simply cannot support the government's reading of § 924(c)(1)(B)(ii). In *McMillan*, the Court rejected a due process challenge to the Pennsylvania Mandatory Minimum Sentencing Act. 477 U.S. at 84-91. The Act set a five-year mandatory minimum sentence for certain enumerated felonies (*e.g.*, murder, robbery, kidnapping, rape) where the defendant visibly possessed a firearm. *Id.* at 83. It did not provide for the imposition of a sentence separate from that imposed for the underlying felony, nor did it remove elements from any of the enumerated offenses. *Id.* Rather, it set a mandatory minimum sentence for those offenses, "which may be more or less than the minimum sentence that might otherwise have been imposed." *Id.* The Court acknowledged that it had not precisely defined the constitutional limits on the power of states to reallocate burdens of proof in criminal cases. *Id.* at 84-91. Without purporting to do so in *McMillan*, the Court held that the Pennsylvania statute did not violate due process. *Id.* That statute, according to the Court, "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given to that factor." *Id.* at 89-90.

The constitutional limitations that were recognized

but not defined in *McMillan* apply here and prohibit the government from obtaining dramatically increased sentences without application of these constitutional principles.

4. The driving force behind the government's argument is its desire to "streamline guilt-stage proceedings" and to avoid the necessity of proving to a jury that a defendant knew the firearm was a machinegun. Gov. Br. 33. But these administrative concerns, as noted earlier, are simply no justification for infringing upon the individual rights of defendant.

In any event, the government offers no evidentiary support for its claims of difficulties in obtaining convictions, and none is apparent in the available data. To the contrary, as summarized in Mr. Burgess's brief in opposition, the data disclose no apparent disparity in sentencing that might correspond to the circuit courts' rulings on whether firearm type is an element. See Burgess BIO apps. A, B.

In addition, the claimed problem of proof would pertain to only a very few factual scenarios that arise under § 924(c)(1)(B)(ii). If the firearm is a destructive device, such as a bomb, it is hard to imagine prosecutors having great difficulty proving a defendant's knowledge. Further, if it is a firearm that was manufactured to function in automatic mode, *mens rea* again should present little or no unusual difficulty. Only in cases like this one, where the firearm was not manufactured to function as a machinegun—and its ability to do so is not obvious—*might* proof of knowledge present a challenge. But this Court should not look to eliminate that challenge at the expense of due process, notice, and jury trial rights, particularly where the consequence to defendants is so staggering.

B. This Court's Decision In *Harris* Is Not To The Contrary.

In *Harris*, a divided Court affirmed imposition of a seven-year mandatory minimum sentence for brandishing a firearm under § 924(c)(1)(A)(ii). 536 U.S. at 568. *Harris* cannot save the government's interpretation of § 924(c)(1)(B) because its conclusion was largely driven by features of the brandishing provision that are not present in the firearm-type provisions.

The Court in *Harris* viewed the seven-year mandatory minimum for brandishing as a sentencing option that was available even without a finding of brandishing. *Id.* at 561. But the thirty-year sentence called for in § 924(c)(1)(B)(ii) could *not* be imposed based solely on the facts to which the respondents pled guilty. A sentence of that length without the machinegun finding would be an unreasonable departure from the Guidelines, which call for a seven-year sentence. See U.S.S.G. § 2K2.4(b) ("the guideline sentence is the minimum term of imprisonment required by statute"). Because upward departures are rare in § 924(c) sentencing, an increase this dramatic would require a compelling justification. See *Gall*, 552 U.S. at 50.

C. To The Extent *McMillan* and *Harris* Would Permit The Government's Interpretation, They Should Be Overturned.

In *Jones* and *Apprendi*, the Court articulated the important Fifth and Sixth Amendment principles that the government says do not apply here because the increase in the sentence affects "only" a mandatory minimum. Gov. Br. 24. If the government can use *McMillan* and *Harris* as a shield

against constitutional protections, then the Fifth and Sixth Amendment principles articulated in *Apprendi* will operate only when the government so desires.

1. Any criminal statute could be amended to substitute mandatory minimums for fixed sentences, inserting life imprisonment as the maximum sentence or failing to provide any maximum sentence at all. By this reasoning, Congress could *Mullaney*- and *Apprendi*-proof any or all criminal statutes by insuring that no element recast as a sentencing factor—indeed, nothing at all—would increase the statutory maximum.

This obviously reflects an overly expansive reading of *McMillan* and *Harris*. In neither of these cases did the Court establish a categorical rule that exempted mandatory minimum sentences from constitutional scrutiny. *McMillan* expressly declined to delineate the limitations on the power of states to redefine criminal offenses. 477 U.S. at 84-91. And the *Harris* plurality suggested that its own conclusion might be questioned when a statute increased the mandatory minimum (but not the maximum) *based on a factor traditionally treated as an element*. 536 U.S. at 560.

Section 924(c)(1)(B) itself provides compelling reasons for distinguishing *McMillan* and *Harris*. *First*, firearm type was previously treated as an element in this very statute, consistent with this Court's observation of its traditional treatment. See *Castillo*, 530 U.S. at 123-31. *Second*, the increase in sentence based on a machinegun finding is categorically different than those considered in *McMillan* or *Harris*. It not only exceeds the sentence authorized by the jury verdict; it completely overshadows it. Cf. *id.*

2. *Harris* carries little, if any, precedential weight on this issue. Only four Justices joined the opinion's constitutional discussion. 536 U.S. at 556-68. The remaining five—four in dissent, and one concurring in the judgment (based on disagreement with *Apprendi* itself)—concluded that the plurality's conclusion was inconsistent with *Apprendi*. See *id.* at 569-72 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 572-83 (Thomas, J., dissenting). The plurality opinion thus cannot be viewed as binding. *CTS Corp.* v. *Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987).

The *Harris* plurality opinion need not and should not be followed. As Justice Thomas explained:

> It is true that *Apprendi* concerned a fact that increased the penalty for a crime beyond the prescribed statutory maximum, but the principles upon which it relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum: When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is "by definition [an] 'elemen[t]' of a separate legal offense." Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.

536 U.S. at 579 (Thomas, J., dissenting); see also *id.* at 577-78 ("As a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards.").

This same concern with the range of penalties to which a defendant may be exposed drove the Court's earlier decisions. For example, in *Jones*, the Court repeatedly referred to sentencing "ranges" rather than statutory maxima alone. *E.g.*, 526 U.S. at 233, 244, 248; see also *id.* at 252 (Stevens, J., concurring) (same); *id.* at 253 (Scalia, J., concurring) (same).

The *Harris* dissent correctly recognized this incongruity between the precedents set by *Jones* and *Apprendi* on the one hand, and *McMillan* on the other. 536 U.S. at 577-79 (Thomas, J., dissenting). That dissent is more in line with the conflicted nature of the cases holding precedential authority, while the *Harris* plurality resolves that conflict only by bracketing the precedent.

3. This Court need not disturb the holdings of either *McMillan* or *Harris* to conclude that the firearm-type provision of § 924(c)(1)(B) contains offense elements. See *supra* Part II.B. It need not do so even to conclude that the government's reading of § 924(c)(1)(B) violates the Fifth and Sixth Amendment rights of the respondents in this particular case. See *infra* Part II.D. But, if this Court interprets these cases as establishing a rule that *any* increase to a mandatory minimum sentence based on a judge-found facts—no matter how great and even if based on a fact that was formerly and traditionally an offense element—is not a "higher penalt[y] at all," *Harris*, 536 U.S. at 554, and thus constitutionally permissible, then those cases must be overturned.

D. Reading § 924(c)(1)(B) To Contain Sentencing Factors Would Violate The Respondents' Fifth And Sixth Amendment Rights In This Case.

The government's interpretation of § 924(c)(1)(B)(ii) raises other serious constitutional concerns that are rooted in the jurisprudence of sentencing after *United States* v. *Booker*, 543 U.S. 220 (2005).

1. After *Booker*, this Court clarified the parameters of substantive reasonableness review. In *Rita* v. *United States*, 551 U.S. 338 (2007), the Court held that properly calculated within-Guidelines sentences enjoyed a presumption of reasonableness. *Id.* at 347. The same year, in *Gall*, the Court explained that, in imposing sentences outside the Guidelines range, "a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or unusually harsh sentence is appropriate in a particular case with sufficient justifications." 552 U.S. at 46. The sentencing court must "ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* at 50. Rejecting a presumption that sentences outside the Guidelines range are *un*reasonable, *Gall* held that "appellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines" in reviewing the reasonableness of a sentence. *Id.* at 47.[17]

Reasonableness review has constitutional implications. As Justice Scalia noted in *Rita*,

---

[17] Notably, however, the facts supporting the petitioner's sentence in *Gall* had been admitted, 552 U.S. at 64 (Alito, J., dissenting), so the Court had no call to address the Sixth Amendment implications of its ruling.

"[u]nder such a system, for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant." 551 U.S. at 372 (Scalia, J., dissenting). "*Every* sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment." *Id.* at 372.

2. These principles, as applied in this case, highlight the difficulty that would arise if § 924(c)(1)(B)(ii) were held to describe a sentencing factor. Mr. Burgess admitted to brandishing a "firearm" during a crime of violence; they did not admit to using a machinegun, or any enhancing fact. That observation has held true with respect to § 924(c) sentences since *Harris*. See U.S. Sent'g Comm'n, *Monitoring of Criminal Sentences, 2008* (2009). Even where sentencing courts have imposed enhanced sentences in cases involving § 924(c) charges, those sentences (like the one imposed here) are comparatively modest, and even the highest such sentence in a combined sentence for the underlying offense and the § 924(c) offense has been only 177 months (just under fifteen years)—or less than half of the thirty-year mandatory minimum that the government seeks to invoke here. *Id.*

Yet, if firearm type in § 924(c)(1)(B) is read as a sentencing factor, which can be found by the judge based on a preponderance of evidence, then (assuming the government could offer such proof) the sentencing judge would be *required* to impose a sentence more than four times greater than that recommended by the Guidelines. See 18 U.S.C. § 924(c)(1)(B)(ii). It is difficult, if not impossible, to imagine how such a sentence could be justified as "reasonable" based solely on the facts admitted by

Mr. Burgess in his plea, as would be required under the Fifth and Sixth Amendments. See *Gall*, 552 U.S. at 50. To the contrary, a thirty-year sentence imposed upon Mr. Burgess in this case would almost certainly be not only unreasonable, but unconstitutional. See *id.*; see also *Rita*, 551 U.S. at 372 (Scalia, J., concurring in part and concurring in the result) (a sentence of seven times the Guidelines range would be unreasonable absent reliance on additional judge-found facts).

The government dismisses this constitutional problem in one sentence: "Congress has already specified the sentence, and it is not subject to appellate review under *Booker* for reasonableness." Pet. Reply 9. This misses the point. In the absence of this statutory provision, a thirty-year sentence for Mr. Burgess based on the plea-admitted facts would not be substantively reasonable. See *Harris*, 536 U.S. at 557; cf. *Cunningham*, 549 U.S. at 270. "[T]he relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Blakely*, 542 U.S. at 303-304. Here, the plea did not authorize the imposition of a thirty-year sentence.

Thus, interpreted as a sentencing factor, the thirty year mandatory minimum sentence set forth in § 924(c)(1)(B)(ii), if imposed in this case, would be unconstitutional.

3. Treating § 924(c)(1)(B) as a sentencing fact to be found by the judge rather than a separate element to be found by the jury would violate the Fifth and Sixth Amendments as applied in this case. Where, as here, facts are essential to the reasonableness of a defendant's sentence, the Constitution dictates that

those facts must be found by a jury beyond a reasonable doubt.

CONCLUSION

For these reasons, the Court should affirm the decision of the Court of Appeals for the First Circuit.

Respectfully submitted,

JEFFREY T. GREEN
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LESLIE FELDMAN-RUMPLER
Counsel of Record
101 Tremont Street
Suite 708
Boston, MA 02108
(617) 728-9944

TACY F. FLINT
JEREMY G. MALLORY
SEAN A. SIEKKINEN
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

JUDITH H. MIZNER
ASSISTANT FEDERAL
PUBLIC DEFENDER
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
DISTRICT OF MASSACHUSETTS
51 Sleeper Street, 5th Floor
Boston, MA 02110
(617) 223-8061

Counsel for Respondent Arthur Burgess

January 14, 2010

APPENDIX

APPENDIX

1. 18 U.S.C. § 924(c) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

2. 18 U.S.C. § 924(c) (1988 ed.) provided:

Penalties

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under

the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

RESPONDENT'S BRIEF

No. 08-1569

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN O'BRIEN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF FOR RESPONDENT O'BRIEN

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

Timothy P. O'Connell
Counsel of Record
C-8 Shipway Place
Charlestown, MA 02129
(617) 242-4806

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

TABLE OF CONTENTS

BRIEF FOR RESPONDENT O'BRIEN 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 11

I. Section 924(c)(1)'s Machinegun Provision Cannot Apply To O'Brien Because The Government Cannot Prove He Knew The Firearm At Issue Was A Machinegun. 13

II. The Machinegun Provision Remains An Element Of A Greater Offense 18

A. Nothing About The 1998 Amendments To Section 924(c)(1) Requires Revisiting Whether The Machinegun Provision Constitutes An Offense Element. 18

B. Applying The *Castillo* Framework To The New Version Of The Machinegun Provision Confirms That The Provision Remains An Element. 24

1. Unchanged Factors 25

2. The New Text And Structure 29

III. Treating The Machinegun Provision As Sentencing Factor In This Case Would Violate The Fifth And Sixth Amendments 37

A. Treating The Machinegun Provision As A Sentencing Factor In This Case Would Violate The *Apprendi* Doctrine. 38

B. Treating Firearm-Type As A Sentencing Factor Would Allow The "Tail To Wag The Dog" Of The Substantive Offense In Violation Of Due Process 52

CONCLUSION 55

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 24

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim

Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936) 13

Bailey v. United States, 516 U.S. 137 (1995) ..... passim

Blakely v. Washington, 542 U.S. 296 (2004) .. passim

Castillo v. United States, 530 U.S. 120 (2000) ..... passim

Chisom v. Roemer, 501 U.S. 380 (1991) 19

Cunningham v. California, 549 U.S. 270 (2007) ..... passim

Dean v. United States, 129 S. Ct. 1849 (2009) 15, 16, 25, 35

Dep't of Commerce v. United States House of Representatives, 525 U.S. 316 (1998) 19

Dir. of Revenue of Mo. v. CoBank ACB, 531 U.S. 316 (2001) 19

Duncan v. Louisiana, 391 U.S. 145 (1968) 27

Gall v. United States, 552 U.S. 38 (2007) 41, 44

Grogan v. Garner, 498 U.S. 279 (1991) 7, 18

Harris v. United States, 536 U.S. 545 (2002) . passim

Harrison v. PPG Indus., Inc., 446 U.S. 578 (1980) 22, 23

In re Winship, 397 U.S. 358 (1970) 53

Jones v. United States, 526 U.S. 227 (1999) .. passim

Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999) 12

Liparota v. United States, 471 U.S. 419 (1985) 14

Marlowe v. United States, 129 S. Ct. 450 (2008) 44

McMillan v. Pennsylvania, 477 U.S. 79 (1986) ..... passim

Morris v. Reynolds, 264 F.3d 38 (2d Cir. 2001) 11

Morales v. TWA, Inc., 504 U.S. 374 (1992) 22

Mullaney v. Wilbur, 421 U.S. 684 (1975) 53

Ohio v. Johnson, 467 U.S. 493 (1984) 11

Patterson v. New York, 432 U.S. 197 (1977) 53

Ring v. Arizona, 536 U.S. 584 (2002) 38, 39, 52

Rita v. United States, 551 U.S. 338 (2007) ..... passim

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 20

Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47 (2006) 12

Schriro v. Summerlin, 542 U.S. 348 (2004) 27

Staples v. United States, 511 U.S. 600 (1994) .. 14, 15

United States v. Baldwin, 2009 U.S. App. LEXIS 22724 (4th Cir. Oct. 16, 2009) 46

United States v. Batts, 317 Fed. Appx. 329 (4th Cir. 2009) 48

United States v. Beasley, 322 Fed. Appx. 777 (11th Cir. 2009) 47

United States v. Beaudion,
416 F.3d 965 (9th Cir. 2005) 47

United States v. Benford,
574 F.3d 1228 (9th Cir. 2009) 46

United States v. Berryman, 322 Fed. Appx. 216
(3d Cir.), *cert. denied*, 130 S. Ct. 262 (2009) 47

United States v. Booker, 543 U.S. 220 (2005) passim

United States v. Burke, ...888 F.2d 862
(D.C. Cir. 1989) 16

United States v. Cavera, 550 F.3d 180 (2d Cir.
2008), *cert. denied*, 129 S. Ct. 2735 (2009) 48

United States v. Collins, 160 Fed. Appx. 514
(7th Cir. 2005) 47

United States v. Donzo, 335 Fed. Appx. 191 (3d
Cir.), *cert. denied*, 130 S. Ct. 251 (2009) 46

United States v. Dowd, 451 F.3d 1244 (11th
Cir. 2006) 47

United States v. Franklin, 561 F.3d 398 (5th
Cir.), *cert. denied sub nom. Alejandro-
Gonzalez v. United States*, 129 S. Ct. 2848
(2009) & *Salazar-Ramirez v. United States*,
129 S. Ct. 2882 (2009) 14

United States v. Gardellini,
545 F.3d 1089 (D.C. Cir. 2008) 42

United States v. Gatson, 2009 U.S. App.
LEXIS 18272 (7th Cir. Aug. 17, 2009) 46

United States v. Gomez, 302 Fed. Appx. 868
(11th Cir. 2008), *cert. denied sub nom.*,
Aviles v. United States, 129 S. Ct. 1658
(2009) & *Bachiller v. United States*,
129 S. Ct. 1926 (2009) 47

United States v. Harper, 314 Fed. Appx. 478 (3d Cir. 2008) 47

United States v. Harris, 339 Fed. Appx. 533 (6th Cir. 2009) 42

United States v. Harris, 397 F.3d 404 (6th Cir. 2005) 23

United States v. Jackson, 335 Fed. Appx. 933 (11th Cir. 2009) 46

United States v. Johnson, 195 Fed. Appx. 508 (6th Cir. 2006) 47

United States v. Katalinic, 2007 U.S. App. LEXIS 29291 (7th Cir. 2007) 47

United States v. Lanier, 520 U.S. 259 (1997) 36

United States v. Lente, 323 Fed. Appx. 698 (10th Cir. 2009) 42

United States v. Lychock, 578 F.3d 214 (3d Cir. 2009) 42

United States v. Magana, 279 Fed. Appx. 754 (11th Cir. 2008) 47

United States v. Middlebrook, 221 Fed. Appx. 888 (11th Cir. 2007) 47

United States v. Nava-Sotelo, 354 F.3d 1202 (10th Cir. 2003) 14

United States v. Ofray-Campos, 534 F.3d 1 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 588 (2008) 41

United States v. Omole, 523 F.3d 691 (7th Cir. 2008) 42

United States v. Ortega-Rogel, 281 Fed. Appx. 471 (6th Cir. 2008) 41

United States v. Perdomo, 298 Fed. Appx. 185 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 2168 (2009) 47

United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008) 42, 46

United States v. Resendiz-Ponce, 549 U.S. 102 (2007) 12, 13

United States v. Reyes, 542 F.3d 588 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 1027 (2009) 47

United States v. Robinson, 322 Fed. Appx. 105 (3d Cir.), *cert. denied*, 130 S. Ct. 316 (2009) 47

United States v. Rogers, 94 F.3d 1519 (11th Cir. 1996) 15

United States v. Schoultz, 2009 U.S. App. LEXIS 17943 (4th Cir. Aug. 12, 2009) 47

United States v. Stevens, 580 F.3d 718 (8th Cir.), *cert. denied*, 130 S. Ct.___, 2010 U.S. LEXIS 384 (2009) 46

United States v. Tucker, 136 F.3d 763 (11th Cir. 1998) 16

United States v. Wallace, 447 F.3d 184 (2d Cir. 2006) 14

United States v. Wallace, 573 F.3d 82 (1st Cir.), *cert. denied*, 130 S. Ct.___, 2009 U.S. LEXIS 8131 (2009) 47

United States v. Watkins, 509 F.3d 277 (6th Cir. 2007) 47

United States v. Wheeler, 128 Fed. Appx. 58 (10th Cir. 2005) 47

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 15

Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985) 19

Witte v. United States, 515 U.S. 389 (1995) 54

STATUTES AND RULES

18 U.S.C. § 845(b) 34, 1a

18 U.S.C. § 922(o) 15

18 U.S.C. § 924(c)(1) ..... passim

18 U.S.C. § 924(c)(1) (Supp. V 1993) 29

18 U.S.C. § 924(c)(1)(A)(i) 25

18 U.S.C. § 924(c)(1)(A)(ii) 45

18 U.S.C. § 924(c)(1)(B) 21, 29, 30

18 U.S.C. § 981(a)(1)(B) 34, 3a

18 U.S.C. § 2118(a)(3) & (b)(3) 34

18 U.S.C. § 2119(2) & (3) 34, 35

18 U.S.C. § 2247 ..... 34, 5a

18 U.S.C. § 2318 ..... 6a

18 U.S.C. § 2318(a), (c)(3) 34

18 U.S.C. § 2721(a) 34, 9a

18 U.S.C. § 3553(a) 40

18 U.S.C. § 3553(a)(6) 48

46 U.S.C. § 70504 20

49 U.S.C. § 5124(b)(2) 20

49 U.S.C. § 46312(b) 20

Hobbs Act, 18 U.S.C. § 1951 3

Pub. L. No. 99-308 (1986) 26

Pub. L. No. 107–273, 116 Stat. 1809, 1821 (2002) 24

Pub. L. No. 109-92, 119 Stat. 2102 (2005) 24

S. Ct. Rule 14.1(a) 12

U.S.S.G. § 2K2.4(b) 45

OTHER AUTHORITIES

ARCHBOLD, JOHN, PLEADING AND EVIDENCE IN CRIMINAL CASES (5th Am. ed. 1846) 38

BISHOP, J., CRIMINAL PROCEDURE (2d ed. 1872) 38

4 BLACKSTONE, WILLIAM, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 38

CJS STATUTES § 512 19

143 CONG. REC. S405 (May 8, 1997) 21

144 CONG. REC. S12670-02 22

FILSON, LAWRENCE E. AND STROKOFF, SANDRA L., THE LEGISLATIVE DRAFTER'S DESK REFERENCE 87 (2008) 33

HALE, MATTHEW, PLEAS OF THE CROWN (1800) 38

HOUSE OFFICE OF LEGISLATIVE COUNSEL, MANUAL ON DRAFTING STYLE (1995) 33

Press Release, The White House, Office of the Press Secretary, Fact Sheet on Honoring and Protecting Our Law Enforcement (Nov. 13, 1998), *available at* 1998 WL 797591 22

SENATE OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL (1997) 33, 34

BRIEF FOR RESPONDENT O'BRIEN

Respondent Martin O'Brien respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

Section 924(c)(1) of Title 18 of the United States Code establishes punishments for people who use firearms in relation to crimes of violence. One provision of that statute punishes machinegun usage particularly harshly. In *Castillo v. United States*, 530 U.S. 120 (2000), this Court held that the machinegun provision, as set forth in a previous version of the statute, constituted an element of a criminal offense – in other words, that it created a greater offense under the statute than possession of an ordinary firearm in relation to a crime of violence. The Government now argues that amendments Congress made to Section 924(c)(1) in response to a different and unrelated decision from this Court transformed the machinegun provision from an element into a sentencing factor, and thereby also relieved the Government of any statutory obligation to prove that the defendant *knew* the firearm he possessed was a machinegun. The First Circuit rejected this argument, holding that the amendments' treatment of the machinegun provision merely restructured its placement within the statutory scheme without changing its meaning or operation.

1. In 2005, Respondent Martin O'Brien and three others – Respondent Arthur Burgess, Dennis Quirk, and Patrick Lacey – set out to rob an armored car outside of a bank in Boston, Massachusetts. O'Brien,

Burgess, and Quirk arrived on the scene in a minivan. Each possessed a firearm. Upon arriving at the scene, the three men emerged from the minivan and told the security guards who were guarding the car to get on the ground. When one of the guards fled, the men promptly abandoned the attempted robbery. O'Brien drove Burgess and Quirk away in the minivan. No shots were fired, no money was taken, and no one was injured. Gvt. C.A. App. 176-179.

Later that day, law enforcement officers arrested Quirk outside of a train station and executed a search warrant at an apartment leased by a co-conspirator, Jason Owens. Inside, the officers found three firearms that had been used in the crime: an AK-47 semiautomatic rifle, a Sig Sauer pistol, and a Cobray pistol. O'Brien and the others were arrested several days later.

All three firearms that law enforcement recovered were manufactured as semiautomatic weapons. The Cobray, in particular, does not have any "automatic mode" on the selector switch. Nor does it have any other visible indication that its operation has been altered. *See* Gvt. C.A. App. 196, 216. But after the FBI test-fired the Cobray (using its own ammunition), it issued a report claiming that the gun operated in the fully automatic mode that characterizes a machinegun – a claim that O'Brien vigorously disputes. *Compare* BIO 23 *with* U.S. Br. 6. But even if the Cobray was somehow, at some point, transformed from a semi-automatic weapon into a machinegun, there is no evidence that either O'Brien or any of the other defendants believed that the pistol constituted a machinegun. *See* BIO 23-25.

In fact, the two members of the conspiracy whom the Government interviewed both said that none of the participants had any idea whether the Cobray had been modified.

2. The Government charged O'Brien and Burgess with committing three crimes, including – as is relevant here – using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1).[1] Subsection (A) of that statute provides that a defendant who uses a "firearm" during a crime of violence shall be punished by not less than five years in prison. Subsection (B) provides that "[i]f the firearm possessed by a person convicted of a violation of this subsection . . . is a machinegun . . . . the person shall be sentenced to a term of imprisonment not less than 30 years."

The Government charged O'Brien and Burgess with violating Section 924(c) based on two alternative constructions of that statute. Count 3 charged them simply with using a "firearm" under subsection (A), under the theory that subsection (B), the machinegun provision, would be merely a sentencing factor for the judge to find and apply if respondents were convicted. Count 4 charged O'Brien and Burgess directly with using a machinegun under Subsection (B), under the theory that the machinegun provision was an element of a greater offense than Subsection (A) that needed to be charged and proven beyond a reasonable doubt to a jury. J.A. 20-21.

---

[1] The Government also charged O'Brien and Burgess with two counts of violating the Hobbs Act, 18 U.S.C. § 1951. These charges were Counts 1 and 2 in the indictment.

During motion practice concerning these alternative charges, the Government conceded that if Section 924(c)'s machinegun provision stated an element of a greater crime, as charged in Count 4, then it "would have to prove that the defendants knew it was a machine gun." J.A. 28. The Government admitted that it could not meet this burden, noting that "we will not have sufficient evidence to establish that they knew." J.A. 29; U.S. Br. 6-7. Accordingly, the Government proposed that the court dismiss Count 4. J.A. 12 n.2, 29.

At the same time, the Government continued to argue, for two "essentially combined" reasons, that if respondents were convicted on Count 3, they would still be subject to the machinegun provision's thirty-year mandatory minimum sentence. J.A. 28. First, the Government argued that the machinegun provision is properly characterized as a sentencing factor rather than an element of a greater crime. *Id.* Second, the Government asserted that because the machinegun provision is a sentencing factor, it does not have to prove knowledge. *Id.*

The district court rejected the Government's arguments and held that a firearm's status as a machinegun under subsection (B) is an element of a greater crime. Relying on this Court's decision in *United States v. Castillo*, 530 U.S. 120 (2000), which interpreted an earlier version of the machinegun provision, the district court held that the language of the statute, the history of firearm type provisions, and the severity of the resulting mandatory sentence continued to require treating the provision as an element. J.A. 39-42.

Following this ruling, the district court formally granted the Government's motion to dismiss Count 4. J.A. 42. Respondents then changed their pleas to guilty. Gvt. C.A. App. 145.

With the machinegun provision's mandatory thirty-year term off the table, the Government recommended sentencing O'Brien to twelve years in prison on his Section 924(c)(1) conviction. Gvt. C.A. App. 209. O'Brien countered by arguing that a seven-year sentence for the violation would be sufficient, in light of the fact that Section 924(c)(1)(A) requires a term of not less than seven years when the firearm was not just possessed but brandished. Gvt. C.A. App. 231-32. The district court sentenced O'Brien to eight-and-one-half years on Count 3, to run consecutively with his sentences on the other two counts, for a total sentence of fifteen years in prison. Gvt. C.A. App. 237.

3. The Government appealed the sentence for the Section 924(c)(1) violation. The First Circuit affirmed.

Using *Castillo* as its compass, the court of appeals held that the machinegun provision still constituted an element of a greater Section 924(c) offense, not a sentencing factor. The court of appeals noted that the only objective Congress announced in rewriting section 924(c) was to expand the section to cover "'mere' possession of firearms." Pet. App. 9a & n.5. The changes the 1998 amendments made to the firearm *type* provisions, as opposed to the firearm *use* provisions, were primarily structural, simply placing them in a separate subsection from other parts of the statute. The "only . . . substantive difference" in the firearm type provisions, the court of appeals

continued, was "the conversion of the numerical figures from fixed-term sentences to mandatory minimums." Pet. App. 9a-10a. But the court of appeals could find no evidence that this change was designed to turn the machinegun provision into a sentencing factor or to dispense with requiring the Government to prove the "defendant's knowledge" that the gun he allegedly used was, in fact, a machinegun. Pet. App. 8a.

"Absent a clearer or more dramatic change in language or legislative history expressing a specific intent to assign judge or jury functions," the court of appeals concluded that *Castillo* still controlled. Pet. App. 10a.

4. The Government petitioned for a writ of certiorari on the issue whether the machinegun provision states an element or a sentencing factor. O'Brien opposed certiorari on two grounds. First, O'Brien disputed the Government's assertion (Pet. 20) that reversing the First Circuit's decision would lead to O'Brien being resentenced under the machinegun provision. In this respect, O'Brien emphasized that the Government cannot prove the facts necessary to invoke the provision because the firearm at issue is not a machinegun or, at the very least, because none of the defendants "were aware" that it was. BIO 23-25. Second, O'Brien argued, on both statutory and constitutional grounds, that the First Circuit correctly held that the machinegun provision is an element of a greater offense. BIO 7-23. This Court granted the Government's petition.

SUMMARY OF ARGUMENT

In order to prevail in this case, the Government must prevail on two issues it has said are "essentially combined," J.A. 28: (1) that it need not prove under the machinegun provision in Section 924(c)(1) that a defendant *knew* that the firearm at issue was a machinegun; and (2) that the machinegun provision is a sentencing factor, not an element. The Government cannot prevail on either issue.

I. Regardless of whether the machinegun provision constitutes an element or a sentencing factor, the Government must prove that the defendant *knew* that the firearm at issue was a machinegun. Yet the Government has admitted it cannot prove knowledge here beyond a reasonable doubt, and there is no reason to believe the Government could make such a showing by a preponderance of the evidence either. Thus, this case can be resolved (or dismissed) on this ground alone, without resolving whether the machinegun provision constitutes an element or a sentencing factor.

II. As a matter of pure statutory construction, the machinegun provision constitutes an element.

A. This Court held in *Castillo v. United States*, 530 U.S. 120 (2000), that a prior version of the machinegun provision constituted an element. In order now to deem the provision a sentencing factor, this Court would have to find "a clear indication," *see, e.g., Grogan v. Garner*, 498 U.S. 279, 290 (1991), that Congress intended in the 1998 amendments to the Section 924(c)(1) to change the provision's classification. Yet nothing in the text or statutory

history of the amendments evinces any such congressional intent. To the contrary, the amendments' history makes clear that Congress revised Section 924(c)(1) in order to address an entirely different decision from this Court, *Bailey v. United States*, 516 U.S. 137 (1995), which involved whether merely possessing a firearm was enough to trigger the Section's penalties.

B. Even if this Court were to re-analyze the machinegun provision from the ground up, it would still have to conclude that the provision constitutes an element. Four of the five factors that drove this Court's decision in *Castillo* remain unchanged: there is still a tradition of treating firearm type as an element; there is no risk of unfairness in putting this issue to a jury; the punishment the provision commands is still severe; and the legislative history still fails to suggest the Congress wanted the firearm provision to be treated an element. To be sure, the 1998 amendments made some alterations to the text and structure of Section 924(c)(1), which is the fifth *Castillo* factor. But those alterations were inconsequential. The text is still silent as to how the machinegun provision should be classified. And while the provision is now broken down into various subsections, that restructuring, as the Government itself put it in *Castillo*, did nothing more than "reorganize and clarify[] the statute's treatment of firearm type," U.S. Br. 41, *Castillo v. United States*, 530 U.S. 120 (2000) (No. 99-658), pursuant to a then-prevailing drafting policy (which still exists today) of revising old statutes when possible to make them more readable. This restructuring did not change the meaning or operation of the machinegun provision.

III. To any extent that statutory analysis alone is not dispositive, constitutional considerations require this Court to deem the machinegun provision an element.

A. Treating the machinegun provision as a sentencing factor would violate the doctrine of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). That doctrine provides that any fact (other than a prior conviction) that exposes a defendant to a longer sentence than he could otherwise receive must be treated as an element. The Federal Sentencing Guidelines' recommended sentence on the facts of this case, *absent the use of a machinegun*, would be a mere seven years. While that recommendation would be advisory and Section 924(c)(1)(A) would in theory allow for a prison term up to life, the Sentencing Reform Act's "reasonableness" requirement would prohibit any sentence in the range of thirty years. (Indeed, no defendant of whom we are aware has ever received a sentence even *half* that long on similar facts without machinegun usage.) Thus, the thirty-year mandatory-minimum sentence the Government seeks depends on a machinegun finding for its legality. In other words, a finding of machinegun usage would be implicate the *Apprendi* doctrine because it would require a higher sentence than O'Brien could otherwise receive. *See Rita v. United States*, 551 U.S. 338, 371 (2007) (Scalia, J., concurring in part and concurring in the judgment) (recognizing that the Sentencing Reform Act's "reasonableness" requirement will result in some facts exposing defendants to higher sentences than would otherwise be permissible); *Cunningham v.*

California, 549 U.S. 270, 310-11 (2007) (Alito, J., dissenting) (same).

Nothing about this conclusion is inconsistent with this Court's holding in *Harris v. United States*, 536 U.S. 545 (2002). As the Government itself recognizes, *Harris* held merely that the Sixth Amendment does not apply to "fact-finding that raises a minimum sentence *within an otherwise authorized range*." Pet. Reply 8-9 (emphasis added). While this holding will typically insulate facts that dictate mandatory minimum sentences from Sixth Amendment scrutiny, it cannot do so when a provision not only establishes a mandatory minimum but also requires a higher sentence than is otherwise authorized. And that is the case here: the Sentencing Reform Act's reasonableness requirement forbids a thirty-year sentence on these facts absent a machinegun finding.

B. Wholly apart from the *Apprendi* doctrine, treating the machinegun provision as an element would violate the Due Process Clause's limitations on diluting the prosecution's burden of proof. Even the dissenters from the *Apprendi* line of cases have acknowledged that if a statute gives the "impression of having been tailored to permit [a factual] finding to be a tail which wags the dog of the substantive offense," then that finding should be treated as an element. *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986); *see also Blakely v. Washington*, 542 U.S. 296, 344 (2004) (Breyer, J., dissenting). That is exactly what the Government intimates Congress did in the 1998 amendments. According to the Government, Congress took a particularly important fact that was traditionally an element and turned it into a

sentencing factor that now accounts for roughly 75% of the punishment at issue. This Court should avoid concluding that Congress intended to transgress due process principles in this manner.

ARGUMENT

Section 924(c)(1)(B)(ii) requires a prison term of not less than 30 years in prison "[i]f the firearm possessed by a person convicted of a violation of [Section 924(c)(1)] . . . is a machinegun." The Government has conceded that it cannot prove beyond a reasonable doubt that O'Brien *knew* that the Cobray pistol used in his crime was a machinegun. Nor has it ever suggested that it could prove such knowledge by a preponderance of the evidence. The Government also has renounced any ability to proceed against O'Brien if Section 924(c)(1)(B)(ii) sets forth an element of a criminal offense. U.S. Br. 33 n.10.[2]

In light of this statutory, factual, and procedural framework, the Government can obtain a sentence here under Section 924(c)(1)(B)(ii)'s machinegun provision only if it prevails on two issues. First, it must persuade this Court that no proof of knowledge is required under that provision (since it has already conceded that it cannot establish knowledge here).

---

[2] Even if the Government did not renounce any ability to proceed on the basis that the machinegun provision states an element of a greater offense, the Double Jeopardy Clause would prevent such future action, since the count charging O'Brien with such an offense was dismissed and O'Brien was then convicted of a lesser offense. *Ohio v. Johnson*, 467 U.S. 493, 501 (1984); *Morris v. Reynolds*, 264 F.3d 38 (2d Cir. 2001).

Second, it must persuade this Court that machinegun status under Section 924(c)(1)(B)(ii) is only a sentencing factor, rather than an element of a greater offense. The Government recognized below that these issues are "essentially combined." J.A. 28. Indeed, while focusing in this Court on the element/sentencing factor issue, the Government continues to raise arguments regarding the knowledge issue as well. U.S. Br. 33-34. It follows, in this Court's parlance, that each of these issues respecting how Section 924(c)(1)(B)(ii) functions is a "subsidiary question fairly included" within the other. S. Ct. Rule 14.1(a).[3]

The Government cannot prevail on either issue. Furthermore, it makes sense for this Court to address the knowledge issue before turning to the element/sentencing factor issue. The former is exclusively a question of statutory interpretation, whereas the latter may implicate constitutional

---

[3] The fact that the Government simultaneously claims that the knowledge issue is "not a question presented here" cannot take it outside of the ambit of Rule 14.1(a). *See United States v. Resendiz-Ponce*, 549 U.S. 102, 103-04 (2007) (resolving case based on how to construe criminal statute under which defendant was charged even though "the Government expressly declined to 'seek review'" of the court of appeals' treatment of the issue). When, as here, this Court grants certiorari to decide how a provision of law works or whether it is constitutional, "there can be little doubt" that the grant "fairly includes the question of what the statute says." *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 56 (2006); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 540 (1999) (substantive meaning of statute at issue is "intimately bound up" with question of how it is employed).

considerations. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 103-04 (2007) (considering substantive scope of federal criminal statute involved before constitutional issue); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (constitutional questions should be avoided unless "absolutely necessary" to decide case).

I. Section 924(c)(1)'s Machinegun Provision Cannot Apply To O'Brien Because The Government Cannot Prove He Knew The Firearm At Issue Was A Machinegun.

Straightforward principles of statutory construction establish that, regardless of whether the machinegun provision in Section 924(c)(1)(B)(ii) is an element or a sentencing factor, the provision requires the Government to prove the defendant's knowledge that the firearm at issue was a machinegun. In light of the Government's concessions that it cannot prove O'Brien had such knowledge, the First Circuit's decision can be affirmed (or this case could be dismissed as improvidently granted) on this threshold basis alone, without ever reaching the question whether the machinegun provision is an element or a sentencing factor.

1. At O'Brien's sentencing hearing and in the First Circuit, the Government acknowledged that if the machinegun provision in Section 924(c)(1)(B)(ii) still constitutes an element of a greater Section 924(c) offense, "then [the Government] would have to prove that the defendants knew it was a machine gun." J.A. 28; *accord* Gov't. C.A. Br. 8. Put another way, the Government has acknowledged that the

machinegun provision as it existed at least until 1998 required the Government to prove knowledge.

That acknowledgement makes good sense. It is well-established that the Government must prove that a defendant "knowingly" used or carried a firearm to secure a conviction under Section 924(c). *United States v. Franklin*, 561 F.3d 398, 402 (5th Cir. 2009), *cert. denied sub nom. Alejandro-Gonzalez v. United States*, 129 S. Ct. 2848 (2009) & *Salazar-Ramirez v. United States*, 129 S. Ct. 2882 (2009); *accord United States v. Wallace*, 447 F.3d 184, 187 (2d Cir. 2006); *United States v. Nava-Sotelo*, 354 F.3d 1202, 1205 (10th Cir. 2003); *see generally Liparota v. United States*, 471 U.S. 419, 426 (1985) (noting "background assumption" of scienter requirements in criminal statutes). That knowledge requirement logically extends to machinegun status to the extent such status is an element of a greater Section 924(c)(1) offense.

Indeed, requiring proof of knowledge is especially appropriate in this context, as this Court has already held that the Government must prove knowledge of machinegun status to convict a defendant of unlawfully possessing an unregistered machinegun under 26 U.S.C. § 5861(d). *See Staples v. United States*, 511 U.S. 600 (1994). In *Staples*, the Court recognized the possibility that a weapon an individual "genuinely and reasonably believed was a conventional semi-automatic [weapon might turn] out to have worn down into or been secretly modified to be a fully automatic weapon." *Staples*, 511 U.S. at 615 (internal citation and quotation marks omitted). Invoking the maxim that "imposing severe punishments for offenses that require no *mens rea*

would seem incongruous," this Court concluded that the "harsh" ten-year penalty at issue could not be imposed without proof of knowledge. *Id.* at 616-17. The courts of appeals invoked the same reasoning to reach the same conclusion with respect to 18 U.S.C. § 922(o). *See, e.g., United States v. Rogers*, 94 F.3d 1519, 1523 (11th Cir. 1996). And the same risk of mistake is present here – not just in theory but also on the facts of this case, because the Cobray pistol at issue was not manufactured as a machinegun, and contains no visible clues of having been modified into one. *Compare supra* at 2-3 *with Rogers*, 94 F.3d at 1523.

2. The Government maintains, however, that if Congress changed the machinegun provision in 1998 from an element into a sentencing factor, then this reclassification somehow erased the requirement that the Government prove knowledge of machinegun status. J.A. 28, 29, 51. This argument does not make any sense. This Court has never held – nor is there any reason to hold now – that substantive mens rea requirements differ depending solely on whether a statutory sentence-enhancing provision constitutes an element or a sentencing factor.

To begin with, the question whether the Government must prove knowledge is analytically distinct from the question whether a particular issue constitutes an element of an offense or a sentencing factor. Just as Congress can create an offense some of whose elements involve no intent requirement, *cf. United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994), so too can it specify sentencing factors that *do* require proof of knowledge. *See Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) (concluding that

a "defendant must have *intended* to brandish the firearm" to trigger sentencing factor in Section 924(c)(1)(A)(ii)) (emphasis added); *United States v. Burke*, 888 F.2d 862, 866 n.6 (D.C. Cir. 1989) ("Although cases generally apply [the presumption against strict liability] to statutes that define criminal offenses, we have little doubt that it should also be applied to legal norms that define aggravating circumstances for purposes of sentencing."); *United States v. Tucker*, 136 F.3d 763, 764 (11th Cir. 1998) (invoking same principle). So it is plainly not the case that knowledge is always required of elements and never required of sentencing factors.

Whether the Government must prove knowledge to satisfy a criminal statute depends instead on the text and structure of the statutory provision, and the nature of the conduct it covers. *See Dean*, 129 S. Ct. at 1853-54; *Burke*, 888 F.3d at 867-68 (holding that an enhancement for possessing a firearm or other dangerous weapon during the commission of the offense required proof of knowledge). But none of those factors change here depending on whether Section 924(c)(1)(B)(ii)'s machinegun provision constitutes an element or a sentencing factor. All that is at stake in the element/sentencing factor debate is the *procedures* for proving the fact at issue. *See, e.g., Harris*, 536 U.S. at 550 (sentencing factors, unlike elements, need not be "alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt"). Consequently, the Government's *substantive* burden of proof should remain the same: It must prove knowledge of machinegun status under Section 924(c)(1)(B)(ii)

regardless of whether the provision constitutes an element of a greater Section 924(c) offense, or is merely a sentencing factor.

3. The Government cannot provide such proof here. At O'Brien's sentencing hearing, the Government repeatedly conceded that it cannot prove beyond a reasonable doubt that O'Brien knew that the Cobray pistol was a machinegun. *See* J.A. 29 (Government stating that if machinegun status is an element, "we're going to lose on the knowledge, because we will not have sufficient evidence"); J.A. 48, 51. The Government further suggested that it could not prove knowledge even by a preponderance of the evidence. *See* J.A. 28 (Government admitting that "if [924(c)(1)(B)(ii)] is a sentencing factor, we will not have sufficient evidence to establish knowledge"). And the record provides no reason to think otherwise, for the Cobray pistol was not manufactured as a machinegun; it has no visible signs of conversion to one; and the two cooperating defendants told federal authorities they, as well as the other defendants, did not know if it was a machinegun. *See* BIO 23-25. Accordingly, because O'Brien is not eligible for the machinegun sentencing enhancement under any standard of proof, the question whether that provision constitutes an element or sentencing factor is purely academic. This Court should affirm on that basis alone or dismiss the writ as improvidently granted.

II. The Machinegun Provision Remains An Element Of A Greater Offense.

If this Court reaches the question whether the machinegun provision constitutes an element or a sentencing factor, it should deem it the former.

Statutory interpretation in this case does not start from a blank slate. In *Castillo*, 530 U.S. 120, this Court held that the references to firearm types in the previous version of Section 924(c)(1) stated elements of greater crimes, rather than sentencing factors. The Government argues that the 1998 amendments to that section dictate that the machinegun provision now constitutes a sentencing factor. The Government is incorrect. The 1998 amendments did not manifest a sufficient intent to change preexisting law so as to warrant conducting an entirely new statutory analysis of the machinegun provision. And even if this Court were to revisit the question whether the machinegun provision constitutes an element or a sentencing factor, *Castillo*'s analytic framework would still apply and dictate that the machinegun provision remains an element.

A. Nothing About The 1998 Amendments To Section 924(c)(1) Requires Revisiting Whether The Machinegun Provision Constitutes An Offense Element.

1. Congress frequently amends existing statutes. In order to provide stability in the law, however, this Court consistently has refused to disturb settled meanings of particular aspects of an amended statute "[a]bsent a clear indication from Congress of a change in policy." *Grogan v. Garner*, 498 U.S. 279, 290

(1991); *see also Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 323 (2001) (rejecting argument that amendment changed a statute's meaning "because there is no indication that Congress intended to change [a prior interpretation] with the . . . amendments. . . . [I]t would be surprising, indeed, if Congress had eliminated this important fact *sub silentio*."); *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 343 (1998) ("[I]t tests the limits of reason to suggest that despite such silence, Members of Congress . . . intended to enact" a "significant change" in the statute's meaning); *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) ("[W]e are convinced that if Congress had . . . inten[ded]" to change the statute's meaning, "Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the . . . legislative history of the . . . amendment."); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 318 (1985) ("[T]his change was effected without substantive comment, and absent such comment it is generally held that a change during codification is not intended to alter the statute's scope."); *see generally* CJS STATUTES § 512 ("[A] statutory amendment should be construed as intending to state the previously existing law and *not* to change it unless such a purpose *clearly manifests itself*.") (emphasis added).

This canon of construction applies regardless of whether Congress amends a statute before or after this Court interprets the original version of the law. When this Court interprets a federal statute, it determines what the statute has "*always* meant."

Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 n.12 (1994) (emphasis in original). Thus, although this Court did not hold until after Congress enacted the 1998 amendments that the previous version of the machinegun provision constituted an element, one must presume that Congress understood the provision in 1998 to be an element. Indeed, *Castillo* itself found that "Congress intended" the prior version of the machinegun provision to be an element. 530 U.S. at 131.

2. The 1998 alterations to Section 924(c) contain no "clear indication" that Congress intended to transform the machinegun provision from an element into a sentencing factor. For starters, unlike other federal statutes, nothing in the text of the new legislation clearly labeled the machinegun provision as a sentencing factor.[4] Before the amendments, the machinegun provision stated: "[I]f the firearm is a machinegun," the defendant shall be sentenced "to imprisonment for thirty years." 18 U.S.C. § 924(c)(1) (Supp. V 1993). After the amendments, the provision

---

[4] For examples of other such statutes, see 46 U.S.C. § 70501 ("Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense."); 49 U.S.C. § 5124(b)(2) ("[K]nowledge of the existence of a statutory provision, or a regulation or a requirement required by the Secretary, is not an element of an offense under this section."); 49 U.S.C. § 46312(b) ("For purposes of subsection (a), knowledge by the person of the existence of a regulation or requirement related to the transportation of hazardous material prescribed by the Secretary under this part or chapter 51 is not an element of an offense under this section but shall be considered in mitigation of the penalty.").

states essentially the same thing (albeit in a subsection that is separated from other parts of the statute): "If the firearm possessed by a person convicted of a violation of this subsection . . . (ii) is a machinegun . . . , the person shall be sentenced to a term of imprisonment of not less than 30 years." 18 U.S.C. § 924(c)(1)(B).

Nor does anything in the amendments' drafting history indicate Congress intended to make the change the Government suggests. To the contrary, the amendments to Section 924(c)(1) were enacted for reasons entirely unrelated to the machinegun provision. In *Bailey v. United States*, 516 U.S. 137 (1995), this Court held that in order to prove "use" of a firearm under Section 924(c)(1), the Government had to "show active employment of the firearm." *Id.* at 144. The Court reasoned that, "[h]ad Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided." *Id.* at 143.

"[T]he intent" the 1998 amendments, as Senator Jesse Helms put it when introducing them to the Senate Judiciary Committee, was to accept this Court's "invitation" to "make clear that 'possession alone' does indeed 'trigger liability.'" 143 CONG. REC. S405 (May 8, 1997) (statement of Sen. Jesse Helms). Sen. Helms also trumpeted the tough new provisions governing the brandishing and discharge of firearms. But he never suggested that the legislation was intended to alter anything concerning Section 924(c)(1)'s firearm type provisions, let alone the established methods of proving firearm type. *See id.* Nor did anyone else advert to the element/sentencing

factor distinction during the Senate or House hearings.[5]

The Government, in fact, acknowledges that "[t]he legislative history" of the "*Bailey* Fix Act," as it became colloquially known, 144 CONG. REC. S12670-02, 1998 WL 723068 (statement of Sen. Mike DeWine), is "silent" with respect to whether Congress intended to transform the machinegun provision into an element. U.S. Br. 29. As the Government put it in *Castillo*, "there is nothing to suggest that the 1998 amendments were intended to change, rather than simply reorganize and clarify, the statute's treatment of firearm type . . . ." U.S. Br. 41, *Castillo v. United States*, 530 U.S. 120 (2000) (No. 99-658) (U.S. *Castillo* Br.).[6] But the Government now contends (U.S. Br. 29-30) that this silence is irrelevant to the statutory interpretation question at hand, citing *Morales v. TWA, Inc.*, 504 U.S. 374, 385 n.2 (1992), which in turn relies on *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 591-92 (1980).

---

[5] The press release accompanying President Clinton's signing of the bill into law touted the new "stiff, mandatory penalties that apply to criminals who *actually use* firearms during the commission of certain federal crimes." Press Release, The White House, Office of the Press Secretary, Fact Sheet on Honoring and Protecting our Law Enforcement (Nov. 13, 1998), *available at* 1998 WL 797591 (emphasis added).

[6] The Government, of course, contended in *Castillo* that Congress intended all along that the machinegun provision be treated as an element instead of as a sentencing factor. But the important point for present purposes is that the Government recognized that Congress did not intend in 1998 to *change* the provision's classification.

Those cases, however, do not help the Government. In *Harrison*, this Court held simply that silence during the legislative process does not require this Court to adhere to a pre-existing construction of a statute when Congress' desire to change the statute's meaning is "obvious on the face of [the amended] statute." 446 U.S. at 592. This principle might assist the Government if, for example, the 1998 amendments to Section 924(c) had taken a cue from the law that this Court treated as a sentencing factor in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and explicitly labeled the machinegun provision as a sentencing factor. *See McMillan*, 477 U.S. at 81 n.1 ("Provisions of this section shall not be an element of the crime . . . .").

But even though Congress has used such language in several other criminal statutes, *see supra* at 20 & n.4, it did not use such language, or anything close to it, here. Instead, Congress merely broke out the firearm type provisions from other provisions in the law and provided for the possibility of greater punishments than before. It did not clearly label the machinegun provision as either an element or a sentencing factor, suggesting that it was content with its prior treatment as an element.

Lest there be any doubt that Congress did not intend to change the way firearm type must be proved, nine years have passed since this Court held in *Castillo* that the prior version of the machinegun provision constituted an element, and four years have passed since the Sixth Circuit held in *United States v. Harris*, 397 F.3d 404 (6th Cir. 2005), that the machinegun provision still constitutes an element. But in that time, Congress has not enacted

legislation clearly denoting firearm type as a sentencing factor. Whereas Congress acted promptly to override *Bailey*, it has left *Castillo* and *Harris* in place, even while amending other portions of Section 924. *See* Pub. L. No. 107-273, 116 Stat. 1809, 1821 (2002) (amending Section 924(e)(1) to limit civil penalties and Section 924(a) to add a new subsection); Pub. L. No. 109-92, 119 Stat. 2102 (2005) (amending Section 924(c) to add penalties for armor piercing ammunition). This Court should decline to tread where Congress has not gone explicitly, and leave it to Congress to give this Court a "clear indication" if and when it wishes to exercise its prerogative to change the law.

B. Applying The *Castillo* Framework To The New Version Of The Machinegun Provision Confirms That The Provision Remains An Element.

Even if this Court were to re-analyze the current version of Section 924(c), it should reach the same result it reached in *Castillo*: the machinegun provision is an offense element, not a sentencing factor. In *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998), this Court established a multi-factored approach to determine whether a statutory provision constitutes an element or a sentencing factor. In *Castillo*, this Court refined that approach, basing its holding that the machinegun provision constituted an element on five factors: language and structure; tradition; risk of unfairness; legislative history; and severity of punishment. Four of those factors remain entirely unchanged. Nothing about the fifth – the language and structure of the machinegun provision – demonstrates that the 1998

amendments require a different result than in *Castillo*. To the contrary, a careful analysis of that factor shows that the amendments – as the Government put it in *Castillo* – were simply meant to "reorganize and clarify," rather than to change, "the statute's treatment of firearm type." U.S. *Castillo* Br. at 41.

1. Unchanged Factors

a. *Tradition.* In *Castillo*, this Court noted that "numerous gun crimes make substantive distinctions" in the form of elements "between weapons such as pistols and machineguns." 530 U.S. at 127. By contrast, the Court could not say "that courts have typically or traditionally used firearm types (such as 'shotgun' or 'machinegun') as sentencing factors." *Id.* at 126. Nothing about that analysis changes here; the provision at issue obviously continues to punish machinegun use.

The Government argues that the amended version of the machinegun provision "belongs to a somewhat different tradition" than the prior version because the amended version is phrased in terms of setting a mandatory minimum sentence. U.S. Br. 22, 24. But the possession provision of Section 924(c)(1)(A) is also phrased in terms of setting a mandatory minimum sentence; just like the machinegun provision, it requires the defendant to "be sentenced to a term of imprisonment of not less than" a specified term of years. 18 U.S.C. § 924(c)(1)(A)(i). Yet this Court already has made clear (and the Government does not here dispute) that the possession provision sets forth an element of a substantive offense. *Dean*, 129 S. Ct. at 1853.

There is no reason to treat the machinegun provision any differently.[7]

b. *Risk of Unfairness.* In *Castillo*, this Court concluded that the realities of trial favored treating the machinegun provision as an element because "ask[ing] a jury, rather than a judge, to decide whether a defendant used or carried a machinegun would rarely complicate a trial or risk unfairness," 530 U.S. at 127, whereas "a contrary rule – one that leaves the machinegun matter to the sentencing judge – might unnecessarily produce a conflict between the judge and the jury," *id.* at 128. Once again, nothing about that analysis changes here.

The Government protests that "[n]o great policy interest would be served by treating firearm type as an offense element because a jury determination is unlikely to improve the accuracy of fact-finding on such an issue." U.S. Br. 33. That assertion, however, is nothing more than a disagreement with *Castillo*.

In any event, the Government misses the point entirely. The primary function of juries is not to increase accuracy; "for every argument why juries are more accurate factfinders, there is another why they

---

[7] The Government also argues that *Castillo's* analysis is no longer valid because the Federal Sentencing Guidelines sometimes treat firearm type as a sentencing factor. U.S. Br. 23. But this does not add anything to what the Government could have argued in *Castillo*. The Sentencing Reform Act, which established the guidelines system, was enacted in 1984, two years before the original machinegun provision of Section 924(c) was enacted, *see* Pub. L. No. 99-308 (1986) (amending statute to insert machinegun provision), and long before this Court considered the *Castillo* case.

are less accurate." *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). Instead, the purpose of juries is to interpose citizens between the Government and the judiciary, thereby ensuring that "the judge's authority to sentence derives wholly from [those citizens'] verdict." *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see generally Duncan v. Louisiana*, 391 U.S. 145, 151-58 (1968). Juries cannot serve that function if they are "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 307. Thus, especially when, as here, the Government insists that the fact at issue is "particular[ly]" serious and therefore triggers the need for especially harsh punishment, U.S. Br. 31-32, it makes eminent sense for Congress to interpose the jury in this fashion, and also to require the fact to be proven beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000) ("structural democratic constraints . . . discourage legislatures" from transforming important facts into sentencing factors).

c. *Severity.* This Court observed in *Castillo* that "the length and severity of an added mandatory sentence that turns on the presence or absence of a 'machinegun' . . . weighs in favor of treating such offense-related words as referring to an element." 530 U.S. at 131; *see also Jones v. United States*, 526 U.S. 227, 233 (1999) ("It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring

with them for a defendant's benefit."). That observation is just as true today. Now, as then, a machinegun finding mandates a thirty-year prison term.

The Government contends that the 1998 amendments change the analysis because the prison term that the machinegun provision requires is now theoretically available under Section 924(c)(1) without proof of machinegun use. U.S. Br. 25. This argument is unavailing. In *Castillo*, this Court held that the severity of the "mandatory" sentence for machinegun use counseled toward treating that fact as an element. 530 U.S. at 131. It does not matter from this standpoint whether such a sentence would also theoretically be available (but not mandatory) absent the finding at issue. In any event, the stiff mandatory sentence in this case *does*, as an empirical matter, continue to produce more severe sentences than courts would otherwise give. *See infra* at 46-48 (typical sentences without machinegun use remain between five and ten years).

d. *Legislative History*. In *Castillo*, this Court determined that there was no legislative history that "significantly" supported the Government's position and noted that "the legislative statements that discuss a new prison term for the act of 'us[ing] a machine gun' . . . seemingly describe offense conduct, and, thus, argue *against* (not *for*) the Government's position." 530 U.S. at 130 (emphasis in original). Nothing has changed in this respect either. As elaborated above and as the Government concedes, the legislative history surrounding the 1998 amendments is "silent" on the issue of whether the

machinegun provision constitutes an element or a sentencing factor. U.S. Br. 29; *see supra* at 21-22.

2. The New Text And Structure

The prior version of Section 924(c) provided in relevant part: "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm in a machinegun . . . to imprisonment for thirty years." 18 U.S.C. § 924(c)(1) (Supp. V 1993). In *Castillo*, this Court described this text as "neutral" with respect to the element/sentencing factor classification and found that its single-sentence structure suggested that the provision constituted an element. 530 U.S. at 124.

The text of amended Section 924(c) is no more favorable for the Government. Just as before, the Section provides that "[i]f the firearm . . . is a machinegun," the defendant is subject to an increased mandatory prison term. 18 U.S.C. § 924(c)(1)(B). Just as before, "by emphasizing the phrase 'if *the* firearm is a . . . ,' one can read the language as simply substituting the word 'machinegun' for the initial word 'firearm'; thereby both incorporating by reference the initial phrases that relate the basic elements of the crime and creating a different crime containing one new element, *i.e.*, the use or carrying of a 'machinegun' during and in relation to a crime of violence." *Castillo*, 530 U.S. at 124 (emphasis in original).

To be sure, amended Section 924(c) introduces the machinegun provision with the phrase "[i]f the firearm possessed by a person *convicted of a violation* of this subsection. . . ." 18 U.S.C. § 924(c)(1)(B) (emphasis added). The Government sees significance in the new, italicized language because the phrase "convicted of a violation" seems to presuppose "a finding of guilt, which necessarily precedes sentencing." U.S. Br. 14. But the word "subsection" obviously refers to subsection (c)(1), not (c)(1)(A), thus indicating that anything within subsection (c)(1) may constitute an element. At any rate, the prior version of the statute also pronounced "sentencing" consequences (thus also arguably presuming a preceding finding of guilt) before it got to the machinegun phrase, and this Court nonetheless deemed the machinegun provision an element. Hence, the most the Government can reasonably say about the amended version of the statute is that, just like the previous version, its text indicates that someone can be convicted of violating Section 924(c)(1) without using a machinegun. But that reality says nothing about whether using a machinegun creates a greater offense or merely serves as a sentencing factor for a generic Section 924(c) offense.[8]

---

[8] For much the same reason, it is puzzling that the Government asserts that the firearm type provisions are sentencing factors because they specify "how certain defendants 'shall be sentenced.'" U.S. Br. 11. That same language describes what happens when a person is convicted of the "offense defined in the principal paragraph of Section 924(c)(1)(A)," U.S. Br. 15, which does not contain any sentencing

The Government is thus left to hinge its entire case on the differences in structure between the pre- and post-amendment versions of Section 924(c). Those differences cannot bear the weight the Government places upon them.

To appreciate why that it so, it is useful to start by imagining what would have happened had Congress legislated the "*Bailey* fix" and adjusted the statute's penalties without changing the statute's structure or breaking the single initial sentence into multiple sentences. The result would have been an unwieldy mess:

> (c)(1) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, or

---

factors. *See* 18 U.S.C. § 924(c)(1) (providing that whoever uses or carries a firearm during a crime of violence "*shall* . . . *be sentenced* to a term of imprisonment of not less than 5 years" (emphasis added)). In any event, the prior version of the statute contained the exact same language in the exact same place.

By the same token, the Government's reliance on the "introductory text of Section 924(c)(1)(A)," U.S. Br. 15, cannot aid it because that text applies not only to the machinegun provision but also to the "offense defined in the principal paragraph of Section 924(c)(1)(A)." U.S. Br. 15.

who in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is brandished, to imprisonment for not less than seven years, and if the firearm is discharged, to imprisonment for not less than ten years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for not less than ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for not less than thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used, carried, or possessed.

It takes but a glance at this hypothetical statute to see that such revisions would have made an already convoluted law virtually unreadable. Any competent draftsperson, therefore, would have wanted to break the statute down into subsections.

Indeed, the structural changes Congress made to Section 924(c) follow directly from instructions in contemporary governmental manuals on legislative drafting. Both the House Office of Legislative Counsel and the Senate Office of Legislative Counsel, "in their manuals printed in 1995 and 1997, respectively, adopt[ed] a drafting style that encourage[d] maximum clarity by applying good drafting principles in an organizational structure that uses headings for subdivisions of a section . . . over the 'traditional' style (the predominant style in use before 1990 . . .)." LAWRENCE E. FILSON AND SANDRA L. STROKOFF, THE LEGISLATIVE DRAFTER'S DESK REFERENCE 87 (2008). The manuals explained that the "use of headings is more likely to ensure that each subdivision deals with a single subject and makes the organization of the bill much easier to ascertain." *Id.*

What is more, those governmental manuals specifically encouraged that such structural changes be made when statutes were being amended for other reasons. The House manual explained: "It is a goal that, in time, all Federal law will be in the office style. It is also a goal that uniformity of style be maintained within a statute, at least as required for consistency of interpretation. In amending existing law, attorneys should pursue both goals." HOUSE OFFICE OF LEGISLATIVE COUNSEL, MANUAL ON DRAFTING STYLE (1995) § 205, at 19; *see also* SENATE

OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL (1997) § 126(a)(2), at 26-27 (noting that amendments to one portion of a statute "provides an opportunity to improve the style of the unchanged portions").[9] It is thus wishful thinking for the Government to suggest that the 1998 amendments' structural changes reflect "anything more than th[is] current trend." Pet. App. 9a. As with numerous other criminal statutes in the late 1990s and early 2000s, Congress simply took the opportunity of amending a statute to break it down into multiple subsections for ease of digestion.[10]

At any rate, nothing inherent in the new statutory structure transforms the machinegun provision into a sentencing factor. There is nothing unusual about statutes that describe the basic prohibited conduct in a preamble before breaking out additional facts to be treated as elements of the crime or, as here, of greater crimes. *See, e.g.*, 18 U.S.C. § 2119(2) & (3); 18 U.S.C. § 2118(a)(3) & (b)(3). As a

---

[9] The House Manual is available at: http://thecapitol.net/Research/images/HOLC.Manual.on.Drafting.Style.1995.pdf. Among other things, it is striking that the examples in Section 204 of a "traditional" law and a "new" one track the structural differences between the pre- and post-1998 versions of Section 924(c). *Id.* § 204, at 14-18. The Senate manual is not available online.

[10] For other examples of this phenomenon, see 18 U.S.C. § 815(b) (amended in 2002); 18 U.S.C. § 981(a)(1)(B) (amended in 2001); 18 U.S.C. § 2247 (amended in 1998); 18 U.S.C. § 2318(a), (c)(3) (amended in 2004); 18 U.S.C. § 2721(a) (amended in 2000). These statutes, both before and after they were amended, are set out fully in the Appendix to this brief.

result, the "'look' of the statute . . . is not a reliable guide to congressional intentions" on the element/sentencing factor front. *Jones*, 526 U.S. at 233 (construing 18 U.S.C. § 2119(2) & (3)).

The Government argues that, in light of this Court's holdings in *Harris* and *Dean* that Section 924(c)'s firearm *use* provisions are sentencing factors, this Court must interpret *type* provisions as sentencing factors, too, in order to ensure that the statute contains "an orderly progression from offense elements to sentencing considerations." U.S. Br. 20. O'Brien is aware of no canon of statutory construction that provides that criminal statutes must progress from elements to sentencing factors. Indeed, if anything, the Government's focus on structure and order gets things exactly backward. The simplest way for Congress to have rendered both the use provisions and the type provisions sentencing factors would have been to list them all together under the same subsection. Certainly there would not have been any linguistic obstacle to doing so; subsections in both provisions start with the phrase "if the firearm . . . ." But instead of listing the use and type provisions together, Congress put the firearm type provisions in a separate subsection from the use provisions (and also from the statute's recidivism provisions, which were already sentencing factors), signaling that the firearm type provisions are somehow different. The obvious way in which the firearm type provisions are distinct from those others is that, at least before the amendments, they were *elements*. That the type provisions ended up "surrounded" (U.S. Br. 19) by sentencing factors is simply a consequence of their sandwiched location in

the original statute, which was carried forward in the amendments.

In the end, it must be remembered that structure is just one factor in the calculus when, as here, no language in the provision explicitly says whether the provision is an element or a sentencing factor. *See Castillo*, 530 U.S. at 124-31. In *Jones*, for example, this Court held that the "fairest reading" of a provision with a structure similar to the one at issue here was that it constituted an element because factors such as history, tradition, and penalty severity suggested that the provision should be an element. 526 U.S. at 239. By contrast, this Court held in *Harris* that another similarly structured provision was a sentencing factor because history, tradition, and the relatively mild penalties for firearm use *all* supported treating the provision as such. 536 U.S. at 553-55. This case is much more like *Jones* than *Harris*. Whatever inference or presumption might arise from the structure of the machinegun provision is easily overcome by the other four factors that remain unchanged from *Castillo*, when this Court concluded that the provision was an element.[11]

---

[11] To the extent this question is a close one, the rule of lenity – otherwise known as the "canon of strict construction of criminal statutes," *United States v. Lanier*, 520 U.S. 259, 266 (1997) – dictates resolving that doubt in favor of the defendant.

III. Treating The Machinegun Provision As Sentencing Factor In This Case Would Violate The Fifth And Sixth Amendments.

Even if statutory analysis alone did not resolve this case, two constitutional impediments to holding here that the machinegun provision is a sentencing factor should determine the outcome. First, treating firearm type as a sentencing factor would violate the Sixth Amendment's jury-trial guarantee as applied to this case because a thirty-year sentence, absent a machinegun finding, would be substantively unreasonable under the Sentencing Reform Act. In other words, the machinegun finding is subject to the doctrine of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the sentence the Government seeks is permissible only if such a finding is made. Second, even apart from *Apprendi*, the machinegun provision must be treated as an element because it is the "tail which wags the dog," *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986), of the Section 924(c)(1) offense the Government has charged. In other words, treating the machinegun provision as a sentencing factor would transgress the Due Process Clause's limitations on diluting the standard of proof concerning the facts that drive the punishment the Government seeks.

Accordingly, this Court, if necessary, should reject the Government's request to treat the machinegun provision as a sentencing factor either based on the doctrine of constitutional avoidance, *see Jones*, 526 U.S. at 239, or because it is outright unconstitutional.

A. Treating as the Machinegun Provision As A Sentencing Factor In This Case Would Violate The *Apprendi* Doctrine.

1. The Sixth Amendment guarantees the right to trial by jury, and the Fifth Amendment requires fair notice of all criminal charges and that all elements of a crime be proven beyond a reasonable doubt. As these rights developed at common law and were understood at the time of the Founding, "[w]here a statute annexe[d] a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, [had to] expressly charge it to have been committed under those circumstances, and [had to] state the circumstances with certainty and precision." JOHN ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES *61 (5th Am. ed. 1846) (citing 2 MATTHEW HALE, PLEAS OF THE CROWN *170 (1800)). In addition, the "the truth of every accusation" in the indictment had to be proven to the jury beyond a reasonable doubt. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *343 (1769). Thus, every fact "which the law ma[de] essential to the punishment" the prosecution sought to impose was treated procedurally as an element. *Blakely v. Washington*, 542 U.S. 296, 301-02 (2004) (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)).

In the *Apprendi* line of cases, this Court has carried these principles forward to modern times, holding that when the prosecution invokes modern statutes dictating certain punishments for certain acts, any fact (other than a prior conviction) that

increases the "prescribed range of penalties to which a criminal defendant is exposed" must be treated as an element. *Apprendi*, 530 U.S. at 490 (internal quotation marks omitted); *see also Cunningham v. California*, 549 U.S. 270, 275 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely*, 542 U.S. at 301-02; *Ring v. Arizona*, 536 U.S. 584 (2002). Put another way, "all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring); *see also Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.").

By contrast, this Court held in *Harris v. United States*, 536 U.S. 545 (2002), that the *Apprendi* doctrine does not apply to facts that require a judge to impose a minimum sentence within an already authorized sentencing range. In other words, if the punishment a factual finding dictates "may be imposed with or without the factual finding," then the Fifth and Sixth Amendments do not apply to the finding, for "the finding is by definition not 'essential' to the defendant's punishment." *Id.* at 561 (plurality opinion).

The question whether the *Apprendi* doctrine applies to the machinegun provision in this case, therefore, depends on whether the thirty-year sentence the provision dictates could be imposed

"without th[at] factual finding." *Harris*, 536 U.S. at 561 (plurality opinion). And that question, in turn, depends upon examining the interplay between the Sentencing Reform Act (SRA) and Section 924(c)(1)'s provisions establishing maximum and minimum sentences for various forms of using a firearm during a crime of violence.

2. The SRA previously required courts to sentence defendants according to the Federal Sentencing Guidelines. In *Booker*, however, this Court excised the provisions in the SRA that had made the Guidelines binding. 543 U.S. at 245. Going forward, the Guidelines play an "advisory" role in sentencing. In any given case, courts must consider the Guidelines' recommended sentence, along with various other factors enumerated in 18 U.S.C. § 3553(a).[12]

---

[12] The complete list of factors includes: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, (B) to afford adequate deterrence to criminal conduct, (C) to protect the public from further crimes of the defendant, (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the Federal Sentencing Guidelines; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a).

But this Court has been careful to note that the post-*Booker* advisory sentencing system does not permit courts to impose any sentences they wish. In particular, courts are not free to impose sentences at the default statutory maximum in every case. Rather, *Booker* emphasized that the SRA continues to require courts to impose "reasonable" sentences, as defined by reference to the applicable Guidelines range and the other factors set forth in section 3553(a). *See Booker*, 543 U.S. at 261-62. This "reasonableness" requirement means that when the maximum guideline sentence is far below the default statutory maximum, the SRA may set a statutory maximum somewhere below the default maximum sentence. Alternatively stated, "*Booker's* reasonableness review necessarily supposes that some sentences" within default statutory limits "will be unreasonable in the absence of additional [judge-found] facts justifying them." *Cunningham*, 549 U.S. at 309 (Alito, J., dissenting).

This Court elaborated on the concept of substantive reasonableness in *Gall v. United States*, 552 U.S. 38 (2007). There, it explained that a "district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an . . . unusually harsh sentence is appropriate in a particular case with sufficient justifications." *Id.* at 46. If the judge's explanation fails to justify "the extent of a deviation from the Guidelines," the sentence is substantively unreasonable and therefore unlawful. *Id.* at 47. Although this Court has not yet itself reversed a sentence on these grounds, the courts of appeals following *Gall* have confirmed that some above-

Guidelines sentences within default statutory ranges are unreasonably high.[13] (The statutory reasonableness requirement also applies to below-Guidelines sentences; thus, courts of appeals also have found, at the Government's urging, several such sentences to be unreasonably low because they are too far out of line with recommended Guidelines ranges.[14])

3. As several members of this Court have recognized, the requirement that federal sentences be

---

[13] *See, e.g., United States v. Ortega-Rogel*, 281 Fed. Appx. 471 (6th Cir. 2008) (21-month sentence substantively unreasonable where the Guideline range was 8-14 months); *United States v. Ofray-Campos*, 534 F.3d 1, 42-44 (1st Cir. 2008) (480-month sentence substantively unreasonable where guidelines range was 188-235 months), *cert. denied*, 129 S. Ct. 588 (2008); *United States v. Lente*, 323 Fed. Appx. 698, 717 (10th Cir. 2009) (Holmes, J., concurring) (216-month substantively unreasonable where guidelines range was 46-57 months).

[14] *See, e.g., United States v. Lychock*, 578 F.3d 214 (3d Cir. 2009) (five-year term of probation substantively unreasonable where guidelines range was 30-37 month prison sentence); *United States v. Harris*, 339 Fed. Appx. 533 (6th Cir. 2009) (84-month sentence substantively unreasonable where guidelines range was 210-262 months); *United States v. Omole*, 523 F.3d 691 (7th Cir. 2008) (12-month sentence substantively unreasonable where guidelines range was 63-78 months); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) (five-year term of probation substantively unreasonable where guidelines range was 97-120 month prison sentence); *see also United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008) (Williams, J. dissenting) (agreeing with Government that five-year term of probation was substantively unreasonable where guidelines range was 10-16 month prison sentence).

statutorily "reasonable" means that *Apprendi* doctrine applies to any fact that is *necessary* in a given case to prevent a sentence from being unreasonably high. Justice Scalia explained this concept most fully in his concurrence in *Rita v. United States*, 551 U.S. 338, 368 (2007): When the sentence the Government seeks can be defended as statutorily reasonable "only because [of] additional judge-found facts" – that is, "aggravating facts, not found by the jury, that distinguish the case from the mine run" – then those facts are subject to the Sixth Amendment. *Id.* at 369-370 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment).

Justice Scalia provided a hypothetical example of this principle at work:

> [C]onsider two brothers with similar backgrounds and criminal histories who are convicted by a jury of respectively robbing two banks of an equal amount of money. Next assume that the district judge finds that one brother, fueled by racial animus, had targeted the first bank because it was owned and operated by minorities, whereas the other brother had selected the second bank simply because its location enabled a quick getaway. Further assume that the district judge imposes the statutory maximum upon both brothers, basing those sentences primarily upon his perception that bank robbery should be punished much more severely than the Guidelines base level advises, but explicitly noting that the racially biased decisionmaking of the first brother further

> justified his sentence. Now imagine that the appellate court reverses as excessive only the sentence of the nonracist brother. Given the dual holdings of the appellate court, the racist has a valid Sixth Amendment claim that his sentence was reasonable (and hence lawful) only because of the judicial finding of his motive in selecting his victim.

551 U.S. at 371; *see also Marlowe v. United States*, 129 S. Ct. 450 (2008) (Scalia, J., dissenting from the denial of certiorari) (stating that when a sentence is substantively reasonable "solely because of [a] judge-found fact," that fact is subject to Sixth Amendment procedures).

The Justices in the *Rita* majority did not dispute the validity of Justice Scalia's analysis. Instead, they found only that such a scenario was "not presented by [that particular] case." *Rita*, 551 U.S. at 353. Justices Stevens, joined by Justice Ginsburg, also wrote separately to express their view that the viability of an as-applied Sixth Amendment challenge should be "decided if and when [a non-hypothetical] case arises" in this Court. *Id.* at 365-66. And in *Cunningham*, this Court held that the Sixth Amendment applied to a state sentencing system that operated, at least in the dissent's view, just like *Booker*'s substantive reasonableness system, in that certain sentences were statutorily unreasonable absent facts beyond the guilty verdicts. *See Cunningham*, 549 U.S. at 310-11 (Alito, J., joined by Kennedy, J., and Breyer, J., dissenting). Thus, "[t]he door . . . remains open" in federal cases for a defendant to invoke the Sixth Amendment by demonstrating that the sentence the Government

seeks would not be "upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall*, 552 U.S. at 60 (Scalia, J., concurring).

4. While such is unlikely to be the case in the context of most mandatory-minimum laws, which require sentences in the five-to-ten-year range, such *is* the case here. The machinegun provision would subject O'Brien not only to a mandatory sentence of at least thirty years, but also to a higher sentence than he could otherwise receive.

O'Brien pleaded guilty to possessing a firearm under Section 924(c)(1)(A), and has admitted that he brandished the gun as defined in Section 924(c)(1)(A)(ii). Gvt. C.A. App. 180. Section 924(c) dictates a prison term of not less than seven years, and implies a maximum of life, for that conduct. 18 U.S.C. § 924(c)(1)(A)(ii). But the Federal Sentencing Guidelines specify with respect to violations of Section 924(c)(1), save for an exception not pertinent here, that "the guideline sentence is the minimum term of imprisonment required by statute." U.S.S.G. § 2K2.4(b). Thus, the Guidelines' recommended sentence for the conduct to which O'Brien pleaded guilty is seven years in prison.

The Government seeks to impose a sentence of thirty years in prison – twenty-three years more than the Guidelines' recommended sentence for the conduct to which O'Brien pleaded guilty – based on an allegation that one of the firearms used in the offense, the Cobray pistol, was actually a machinegun. Yet the Government did not include this allegation in the Section 924(c)(1) charge to which O'Brien pleaded guilty, and O'Brien has not otherwise admitted this fact. (In fact, he denies it.)

No jury has found it either. In order for a thirty-year sentence to be consistent with the Sixth Amendment, therefore, this Court would have to hold that imposing such a sentence *without a machinegun finding* would be a statutorily reasonable (and therefore lawful) deviation from the Guidelines' seven-year benchmark. If, on the other hand, a machinegun finding *would be* necessary to render a thirty-year sentence statutorily lawful, then that finding is subject to Sixth Amendment procedures.

Three strands of empirical data show that a machinegun finding would be necessary here to support a thirty-year sentence.

First, no court of which we are aware has *ever* imposed a sentence under Section 924(c)(1) of anywhere near thirty years for brandishing a firearm in furtherance of a bank robbery when the firearm was not a machinegun. *See United States v. Pugh*, 515 F.3d 1179, 1203 (11th Cir. 2008) (finding sentence substantively unreasonable, at Government's urging, in part because "we cannot find a single case [involving the conduct at issue] in which any court has upheld a . . . sentence like this one"). To the contrary, in the vast majority of such cases (after *Booker*, as before), courts impose a seven-year sentence – the Guidelines' recommended sentence and the mandatory minimum.[15] That, in fact, is the

---

[15] *See Harris*, 536 U.S. at 578 (Thomas, J., dissenting) ("Those found to have brandished a firearm typically, if not always, are sentenced only to 7 years in prison . . . .") (citing United States Sentencing Commission, 2001 Datafile); *see also, e.g., United States v. Baldwin*, 2009 U.S. App. LEXIS 22721

sentence that one of respondent's co-defendants received in this case.

Even in the rare cases where courts have exceeded the recommended seven-year sentence, the prison terms they have imposed still come nowhere near thirty years. *See United States v. Schoultz*,

---

(4th Cir. Oct. 16, 2009) (7-year sentence for Section 924(c) charge based on brandishing unspecified firearm during bank robbery); *United States v. Gatson*, 2009 U.S. App. LEXIS 18272 (7th Cir. Aug. 17, 2009) (same); *United States v. Jackson*, 335 Fed. Appx. 933 (11th Cir. 2009) (same); *United States v. Donzo*, 335 Fed. Appx. 191 (3d Cir.) (same), *cert. denied*, 130 S. Ct. 251 (2009); *United States v. Benford*, 574 F.3d 1228 (9th Cir. 2009) (same); *United States v. Stevens*, 580 F.3d 718 (8th Cir.) (same), *cert. denied*, 130 S. Ct. ___, 2010 U.S. LEXIS 384 (2009); *United States v. Wallace*, 573 F.3d 82 (1st Cir.) (same), *cert. denied*, 130 S. Ct. ___, 2009 U.S. LEXIS 8131 (2009); *United States v. Berryman*, 322 Fed. Appx. 216, 219 (3d Cir.) (same), *cert. denied*, 130 S. Ct. 262 (2009); *United States v. Robinson*, 322 Fed. Appx. 105 (3d Cir.) (same), *cert. denied*, 130 S. Ct. 316, (2009); *United States v. Beasley*, 322 Fed. Appx. 777 (11th Cir. 2009) (same); *United States v. Gomez*, 302 Fed. Appx. 868, 869 (11th Cir. 2008) (same), *cert. denied sub nom., Aviles v. United States*, 129 S. Ct. 1658 (2009) & *Bachiller v. United States*, 129 S. Ct. 1926 (2009); *United States v. Perdomo*, 298 Fed. Appx. 185, 187 (3d Cir. 2008) (same), *cert. denied*, 129 S. Ct. 2168 (2009); *United States v. Harper*, 314 Fed. Appx. 478, 479 (3d Cir. 2008) (same); *United States v. Reyes*, 542 F.3d 588 (7th Cir. 2008) (same), *cert. denied*, 129 S. Ct. 1027 (2009); *United States v. Middlebrook*, 221 Fed. Appx. 888 (11th Cir. 2007) (same); *United States v. Katalinic*, 2007 U.S. App. LEXIS 29291 (7th Cir. 2007) (same); *United States v. Watkins*, 509 F.3d 277 (6th Cir. 2007) (same); *United States v. Johnson*, 195 Fed. Appx. 508 (6th Cir. 2006) (same); *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006) (same); *United States v. Beaudion*, 416 F.3d 965 (9th Cir. 2005) (same); *United States v. Wheeler*, 128 Fed. Appx. 58 (10th Cir. 2005) (same).

2009 U.S. App. LEXIS 17943 (4th Cir. Aug. 12, 2009) (ten years); *United States v. Magana*, 279 Fed. Appx. 754 (11th Cir. 2008) (ten years; vacated for procedural errors); *United States v. Collins*, 160 Fed. Appx. 514, 515 (7th Cir. 2005) (almost ten years). The longest sentence we have found for such conduct is fourteen years – less than half of the term the Government seeks here. *See United States v. Batts*, 317 Fed. Appx. 329 (4th Cir. 2009). And in that case, the Fourth Circuit expressed serious concern about that sentence and vacated it on the ground that "the district court's explanation for the sentence [was] devoid of the 'compelling' reasons necessary to justify the upward departure." *Id.* at 332.

In light of this collection of cases, holding that a district court could sentence O'Brien to an unprecedented term of thirty years' imprisonment *without finding that the firearm involved here was a machinegun* would empty the SRA's reasonableness requirement of any meaning. Indeed, treating such a potential sentence as legitimate would make a mockery of the SRA's "basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways." *Booker*, 543 U.S. at 252; *see also* 18 U.S.C. § 3553(a)(6) (requiring courts to "avoid unwarranted sentence disparities"); *cf. United States v. Cavera*, 550 F.3d 180, 224 (2d Cir. 2008) (en banc) (Sotomayor, J., concurring in part and dissenting in part) ("Appellate courts" after *Booker* and *Gall* "must not abdicate their responsibility to ensure that sentences are based on sound judgment, lest we return to the 'shameful' lack of parity . . . which the Guidelines sought to remedy.") (internal citation omitted), *cert. denied*, 129 S. Ct. 2735 (2009).

Virtually any deviation from the Guidelines, no matter how extreme and unprecedented, and no matter how ordinary the case involved, would be substantively reasonable.

Second, as the Government emphasizes at great length, using a machinegun during a crime of violence is far more "dangerous and threatening" than using a firearm that is not fully automatic. U.S. Br. 31-32. Accordingly, once the machinegun provision was off the table in this case, the Government itself sought a mere twelve-year sentence for O'Brien. Gvt. C.A. App. 208. This recommendation was not based on any plea arrangement; the Government was free to recommend whatever sentence it believed was appropriate on the supposition that O'Brien used a firearm but not a machinegun during his crime. The Government chose to advocate a twelve-year term.

Third, the district court in this case, again acting on the supposition that O'Brien used a firearm but not a machinegun, sentenced him to just eight and one-half years for his Section 924(c) violation. J.A. 14. In reaching this number, the sentencing judge explained that it "considered the Section 3553(a) factors." Gvt. C.A. App. 236. He considered the dangerousness of the weapons involved, Gvt. C.A. App. 235-36; the presence of bystanders, Gvt. C.A. App. 236; the volatility of the situation, *id.*; and the amount of money at stake in the robbery, *id.* At the same time, O'Brien never pointed his gun at anyone, and he aborted the attempted robbery as soon as a guard ran, never taking any money or hurting anyone. The district court, therefore, never suggested that O'Brien's actions somehow could

warrant more than *double* the punishment that anyone has *ever* received for violating Section 924(c)(1) without using a machinegun.[16]

This constellation of data makes clear that, even though Section 924(c)(1)(A) provides in theory that court may impose a thirty-year prison term (indeed, it implies a maximum term of life) for using *any* firearm during a crime of violence, the SRA would not allow such a sentence on the facts of this case if the firearm at issue was not a machinegun. Therefore, just as in *Blakely*, the factual finding at issue is "essential to the punishment" the Government seeks to impose. 542 U.S. at 301-02 (internal quotation marks omitted). The sentencing judge would "acquire[] the legal authority to impose the sentence the Government seeks only by finding some additional fact" – the use of a machinegun – beyond those encompassed in O'Brien's guilty plea. *Id.*

5. The Government disputes this conclusion, contending that the Sixth Amendment poses no obstacle to deeming the machinegun provision a sentencing factor in this case "because Congress has already specified the sentence" for using a

---

[16] The district judge told O'Brien that he believed his sentence "could have been higher," but that he chose the eight-and-one-half year term based on his "obligation" under Section 3553(a) "to impose the sentence that's sufficient and no more than necessary." Gvt. C.A. App. 211. Given that Section 3553(a) does indeed impose that obligation, it is unclear why the judge believed he could have given a longer sentence than he believed was necessary.

machinegun at thirty years, thus rendering such a sentence "not subject to appellate review under *Booker* for reasonableness." Pet. Reply 9. This assertion, however, misunderstands how the *Apprendi* doctrine works. When it comes to an argument that the Sixth Amendment as applied to a particular case requires an alleged fact to be treated as an element, the issue is not whether the sentence the Government seeks is would be reasonable, or lawful, *assuming the presence of the fact at issue* (here, that O'Brien used a machinegun). Rather, the issue is whether the sentence the government seeks would be lawful "without finding [that] fact[]." *Rita*, 551 U.S. at 370 (Scalia, J., concurring in part and concurring in the judgment); *see also Blakely*, 542 U.S. at 303-04 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts.") (emphasis in original). And here, without finding that O'Brien used a machinegun, a thirty-year sentence for his Section 924(c) violation would be substantively unreasonable, and thus unlawful, under the SRA.

This reality also explains, lest there be any remaining confusion, why concluding that the Sixth Amendment is implicated here poses no conflict with this Court's decision in *Harris*. This Court did not hold in *Harris* that the Sixth Amendment never applies to any facts that trigger mandatory minimum sentences. Instead, as the Government itself recognizes, *Harris* held merely that the Sixth Amendment does not apply to "fact-finding that raises a minimum sentence *within an otherwise authorized range*." Pet. Reply 8-9 (emphasis added);

see also McMillan, 477 U.S. at 87-88 (Fifth and Sixth Amendments do not apply to a fact that requires the court to impose a certain minimum sentence "within the range already available to it"). Here, the SRA's reasonableness requirement forbids a thirty-year sentence absent a machinegun finding. So *Harris* does not insulate the Government's machinegun allegation from the Sixth Amendment.[17]

B. Treating Firearm-Type As A Sentencing Factor Would Allow The "Tail To Wag The Dog" Of The Substantive Offense In Violation Of Due Process.

Wholly apart from the *Apprendi* problem with deeming the machinegun provision a sentencing factor, doing so would also violate the Due Process Clause's longstanding restrictions on diluting the prosecution's burden of proof.

---

[17] Even if *Harris* were somehow controlling here, the Justices who dissented in that case would do better to adhere to those views than to apply *Harris* here. *Harris* was decided by a bare majority. One member of that majority, Justice Breyer, wrote separately, to acknowledge that the "logic" of *Apprendi* extends to any finding that triggers a mandatory minimum, but asserting that he could "[n]ot yet accept" the *Apprendi* doctrine. *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). This Court has since applied *Apprendi* to numerous other sentencing systems, entrenching that holding in its jurisprudence and acknowledging that it "must be implemented in a principled way." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring); *see also Cunningham*, 549 U.S. at 270; *Booker*, 543 U.S. at 220; *Blakely*, 542 U.S. at 296. When it becomes necessary, *Harris* should be overruled.

The Due Process Clause requires the prosecution to prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). The *Winship* principle would be a dead letter, however, if legislatures were to have "unlimited choice" over whether to deem a stated fact an element. *Jones*, 526 U.S. at 240-41. Accordingly, the Due Process Clause places "constitutional limits" on a legislature's ability to "reallocate burdens of proof" by transforming an issue that was formerly an element into a sentencing factor or affirmative defense. *Patterson v. New York*, 432 U.S. 197, 210 (1977).

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), for instance, this Court observed that a legislature may not dispose of intent or recklessness as elements of murder, and instead allow "a life sentence for *any* felonious homicide – even one that traditionally might be considered involuntary manslaughter – unless the *defendant* [i]s able to prove that his act was neither intentional nor criminally reckless." *Id.* at 699. In *Apprendi*, this Court noted that this independent constitutional principle persists, stating that if, in response to its decision, "New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring the defendant to prove that it was not . . .), we would be required to question whether [under *Mullaney* and other cases] the revision was constitutional." *Apprendi*, 466 U.S. at 490-91 n.16.

This prohibition against "omit[ting] 'traditional' elements from the definition of crimes and instead requir[ing] the accused to disprove such elements," *Jones*, 526 U.S. at 242, applies as well to

transformations of elements into mandatory minimums. In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), this Court upheld a state law allowing judges to make a finding (visible possession of a firearm) that triggered a five-year mandatory minimum sentence. But this Court cautioned that the result might have been different had the statute given the "impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88. In other words, due process concerns arise if a legislature manipulates a criminal statute so that the major portion of a defendant's sentence is attributable to a particular sentencing factor rather than to the offense itself. *See Witte v. United States*, 515 U.S. 389, 403 (1995) (recognizing that if "the enhancing role played by the relevant [sentencing factor] conduct" is large, the sentencing factor may become "a tail which wags the dog of the substantive offense") (internal quotation marks omitted); *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (same).

Taking the Government's view of the 1998 amendments to Section 924(c)(1), this case involves precisely the situation about which this Court has warned. Under this Court's decision in *Castillo*, the machinegun provision was originally an element of a greater offense – one that increased a defendant's permissible sentence by at least twenty years. *Castillo*, 530 U.S. at 131. According to the Government, however, Congress decided in 1998 to "simplifly] and streamline[] guilt-stage proceedings" by rendering *every* violation of Section 924(c) theoretically punishable by life in prison and then leaving it to sentencing judges to discern by a

preponderance of the evidence whether or not defendants used a machinegun and, if so, to sentence them based on this particularly "dangerous" and "threatening" conduct. U.S. Br. 32-33. In this scenario, and in light of the fact that defendants convicted of ordinary Section 924(c) violations continue to receive sentences in the 5-10 year range, *see supra* at 46-48, a machinegun finding, whenever made, would account for at least two-thirds of a defendant's sentence. The "tail" in such a case would overwhelmingly outweigh the "dog," betraying that machinegun use would really be the core conduct that the Government aims to punish.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

Timothy P. O'Connell
Counsel of Record
C-8 Shipway Place
Charlestown, MA 02129
(617) 242-4806

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

January 14, 2010

APPENDIX

18 U.S.C. § 845(b)

The statute originally read:

"A person who had been indicted for or convicted of a crime punishable by imprisonment for a term exceeding one year may make application to the Attorney General for relief from the disabilities imposed by this chapter with respect to engaging in the business of importing, manufacturing, or dealing in explosive materials, or the purchase of explosive materials, and incurred by reason of such indictment or conviction, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the indictment or conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest. A licensee or permittee who makes application for relief from the disabilities incurred under this chapter by reason of indictment or conviction, shall not be barred by such indictment or conviction from further operations under his license or permit pending final action on an application for relief filed pursuant to this section."

The statute was amended in 2002 to read:

(b)(1) A person who is prohibited from shipping, transporting, receiving, or possessing any explosive under section 842(i) may apply to the Secretary for relief from such prohibition.

(2) The Secretary may grant the relief requested under paragraph (1) if the Secretary determines that the circumstances regarding the applicability of section 842(i), and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of such relief is not contrary to the public interest.

(3) A licensee or permittee who applies for relief, under this subsection, from the disabilities incurred under this chapter as a result of an indictment for or conviction of a crime punishable by imprisonment for a term exceeding 1 year shall not be barred by such disability from further operations under the license or permit pending final action on an application for relief filed pursuant to this section.

18 U.S.C. § 981(a)(1)(B)

The statute originally read:

"Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act), within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States."

The statute was amended in 2001 to read:

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense--

(i) involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, or the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined for purposes of the Controlled Substances Act), or any other conduct described in section 1956(c)(7)(B);

(ii) would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year; and

(iii) would be punishable under the laws of the United States by imprisonment for a term exceeding 1 year, if the act or activity constituting the offense had occurred within the jurisdiction of the United States.

18 U.S.C. § 2247

The statute originally read:

"Any person who violates a provision of this chapter, after one or more prior convictions for an offense punishable under this chapter, or after one or more prior convictions under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual contact have become final, is punishable by a term of imprisonment up to twice that otherwise authorized."

The statute was amended in 1998 to read:

(a) Maximum Term of Imprisonment.--The maximum term of imprisonment for a violation of this chapter after a prior sex offense conviction shall be twice the term otherwise provided by this chapter, unless section 3559(e) applies.

(b) Prior Sex Offense Conviction Defined.--In this section, the term "prior sex offense conviction" has the meaning given that term in section 2426(b).

18 U.S.C. § 2318

Subsection (a) of the statute originally read:

"Whoever, in any of the circumstances described in subsection (c) of this section, knowingly traffics in a counterfeit label affixed or designed to be affixed to a phonorecord, or a copy of a computer program or documentation or packaging for a computer program, or a copy of a motion picture or other audiovisual work, and whoever, in any of the circumstances described in subsection (c) of this section, knowingly traffics in counterfeit documentation or packaging for a computer program, shall be fined under this title or imprisoned for not more than five years, or both."

Subsection (c)(3) of the statute originally read:

"the counterfeit label is affixed to or encloses, or is designed to be affixed to or enclose, a copy of a copyrighted computer program or copyrighted documentation or packaging for a computer program, a copyrighted motion picture or other audiovisual work, or a phonorecord of a copyrighted sound recording; or".

Subsection (a) was amended in 2004 to read:

(a)(1) Whoever, in any of the circumstances described in subsection (c), knowingly traffics in--

(A) a counterfeit label or illicit label affixed to, enclosing, or accompanying, or designed to be affixed to, enclose, or accompany--

(i) a phonorecord;

(ii) a copy of a computer program;

(iii) a copy of a motion picture or other audiovisual work;

(iv) a copy of a literary work;

(v) a copy of a pictorial, graphic, or sculptural work;

(vi) a work of visual art; or

(vii) documentation or packaging; or

(B) counterfeit documentation or packaging,

shall be fined under this title or imprisoned for not more than 5 years, or both.

Subsection (c) was amended in 2004 to read:

(c) The circumstances referred to in subsection (a) of this section are--

(1) the offense is committed within the special maritime and territorial jurisdiction of the United States; or within the special aircraft jurisdiction of the United States (as defined in section 46501 of title 49);

(2) the mail or a facility of interstate or foreign commerce is used or intended to be used in the commission of the offense;

(3) the counterfeit label or illicit label is affixed to, encloses, or accompanies, or is designed to be affixed to, enclose, or accompany--

(A) a phonorecord of a copyrighted sound recording or copyrighted musical work;

(B) a copy of a copyrighted computer program;

(C) a copy of a copyrighted motion picture or other audiovisual work;

(D) a copy of a literary work;

(E) a copy of a pictorial, graphic, or sculptural work;

(F) a work of visual art; or

(G) copyrighted documentation or packaging; or

(4) the counterfeited documentation or packaging is copyrighted.

18 USCA § 2721(a)

The statute originally read:

"(a) In general.--Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record."

The statute was amended in 2000 to read:

(a) In general.--A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): Provided, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

REPLY BRIEF

(p)

No. 08-1569

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Pet. 501 F.3d

TABLE OF CONTENTS

Page

A. Section 924(c)(1) provides that firearm type is a sentencing factor rather than an element 2
1. *Castillo* v. *United States* does not control the meaning of the revised version of Section 924(c)(1) 2
2. Section 924(c)(1)'s language and structure show that firearm type is a sentencing factor 4
3. Secondary factors such as tradition and sentence length support treating firearm type in Section 924(c)(1)(B) as a sentencing factor 8
B. Treating firearm type as a sentencing factor is consistent with constitutional limitations on mandatory minimum sentences 12
1. Mandatory minimum sentences raise no Sixth Amendment concern 13
2. Treating the firearm-type provisions of Section 924(c)(1)(B) as sentencing factors is consistent with the Due Process Clause 16
C. This Court should reject or not decide the other statutory and constitutional claims respondents raise 18
1. This Court cannot and should not decide respondents' putative as-applied Sixth Amendment challenge 18
2. This Court should reject or refuse to decide O'Brien's claim that the government must prove he knew the Cobray was a machinegun 25
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 24
Apprendi v. *New Jersey*, 530 U.S. 466 (2000) ..... *passim*
Bailey v. *United States*, 516 U.S. 137 (1995) 4
Blakely v. *Washington*, 542 U.S. 296 (2004) 14, 15, 17, 18, 21
Bruesewitz v. *Wyeth Inc.*, 561 F.3d 233 (3d Cir. 2009), cert. pending, No. 09-152 (filed Aug. 4, 2009) 6
Castillo v. *United States*, 530 U.S. 120 (2000) 2, 4, 5, 6, 11
Chisom v. *Roemer*, 501 U.S. 380 (1991) 3
Cooper Indus., Inc. v. *Aviall Servs.*, 543 U.S. 157 (2004) 19
Cunningham v. *California*, 549 U.S. 270 (2007) 14
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 20
Deal v. *United States*, 508 U.S. 129 (1993) 4
Dean v. *United States*, 129 S. Ct. 1849 (2009) 4, 25, 26, 27
Department of Commerce v. *United States House of Reps.*, 525 U.S. 316 (1998) 3
Director of Revenue v. *CoBank ACB*, 531 U.S. 316 (2001) 3
FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 19
Finley v. *United States*, 490 U.S. 545 (1989) 3
Gall v. *United States*, 552 U.S. 38 (2007) 23
Grogan v. *Garner*, 498 U.S. 279 (1991) 3
Harris v. *United States*, 536 U.S. 545 (2002) ..... *passim*

Cases—Continued: Page

Hubbard v. *United States*, 514 U.S. 695 (1995) 15
Jones v. *United States*, 526 U.S. 227 (1999) 9, 10, 11
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 2, 13, 17, 18
Morales v. *TWA*, 504 U.S. 374 (1992) 4
Muscarello v. *United States*, 524 U.S. 125 (1998) 4
Oregon v. *Ice*, 129 S. Ct. 711 (2009) 17, 22
Ring v. *Arizona*, 536 U.S. 584 (2002) 14
Rita v. *United States*, 551 U.S. 338 (2007) 13, 19, 20, 21, 22, 23
Smith v. *United States*, 508 U.S. 223 (1993) 4
Staples v. *United States*, 511 U.S. 600 (1994) 26
United States v. *Booker*, 543 U.S. 220 (2005) 14, 15, 23
United States v. *Gonzales*, 520 U.S. 1 (1997) 4
United States v. *Hayes*, 129 S. Ct. 1079 (2009) 6
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 3
Watson v. *United States*, 552 U.S. 74 (2007) 4
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 3

Constitution, statutes, guidelines and rule:

U.S. Const.:
Amend. V 13, 17, 18
Due Process Clause 16, 17
Amend. VI ..... *passim*

Statutes, guidelines and rule—Continued:

Prevention of Terrorist Access to Destructive Weapons Act of 2004, Pub. L. No. 108-458, Tit. VI, Subtit. J, §§ 6903-6906, 118 Stat. 3770-3773 16
Voting Rights Act of 1965, 42 U.S.C. 1973 3
18 U.S.C. 175c 16
18 U.S.C. 921(a)(3) 26
18 U.S.C. 921(a)(23) 26
18 U.S.C. 921(a)(33)(A) 6
18 U.S.C. 922 11
18 U.S.C. 924 11
18 U.S.C. 924(c)(1) ..... *passim*
18 U.S.C. 924(c)(1)(A) 5, 7, 8, 18, 26
18 U.S.C. 924(c)(1)(A)-(C) 7
18 U.S.C. 924(c)(1)(A)(i) 9
18 U.S.C. 924(c)(1)(A)(ii) 6
18 U.S.C. 924(c)(1)(A)(iii) 25, 26
18 U.S.C. 924(c)(1)(B) ..... *passim*
18 U.S.C. 924(c)(1)(B)(i) 6, 12
18 U.S.C. 924(c)(1)(B)(ii) ..... *passim*
18 U.S.C. 924(c)(1)(C) 7
18 U.S.C. 924(c)(1)(D) 7
18 U.S.C. 2332g 16
18 U.S.C. 2332h 16
18 U.S.C. 3553(a) 19, 21
26 U.S.C. 5845(a) 11
26 U.S.C. 5845(b) 27
26 U.S.C. 5861 11

Statutes, guidelines and rule—Continued: Page

26 U.S.C. 5861(d) 26
42 U.S.C. 2722 16
United States Sentencing Guidelines:
Ch. 1:
Pt. A.2 (1987) 10
Ch. 2:
§ 2K2.1 11
Sup. Ct. R. 15.2 25

In the Supreme Court of the United States

No. 08-1569

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

As the government demonstrated in its opening brief (at 12-34), the primary guides to statutory interpretation—language and structure—compel the conclusion that firearm type is a sentencing factor in 18 U.S.C. 924(c)(1), and secondary considerations like tradition and policy also favor that conclusion. Respondents nevertheless argue that the Court should adhere to its construction of the prior version of Section 924(c)(1) and that it should favor considerations like sentence length and silent legislative history over the text of the statute. Their interpretive methodology is misguided and their conclusions mistaken. Nor is there merit to respondents' suggestion that a sentencing-factor approach raises constitutional concerns. This Court in *Harris* v. *United States*, 536 U.S. 545 (2002), reaffirmed that Congress may constitutionally rely on sentencing factors to increase a mandatory minimum sentence within an autho-

rized range. Firearm type plays just that permissible role in Section 924(c)(1).

A. Section 924(c)(1) Provides That Firearm Type Is A Sentencing Factor Rather Than An Element

1. Castillo *v.* United States *does not control the meaning of the revised version of Section 924(c)(1)*

O'Brien contends (Br. 18-36) that *Castillo* v. *United States*, 530 U.S. 120 (2000), continues to control whether firearm type is a sentencing factor in the amended Section 924(c)(1). But *Castillo* itself acknowledged that the "statutory restructuring" in the current version of Section 924(c)(1) "suggest[s] a contrary interpretation" to the one it reached about the prior version. *Id.* at 125. O'Brien's argument (Br. 18-24) that Congress's substantial 1998 revision of Section 924(c)(1) does not disturb *Castillo*'s holding ignores the profound changes Congress made to the statute. See Gov't Br. 35-39. For example, O'Brien's claim that the 1998 revision "contain[s] no 'clear indication' that Congress intended" to change the statute's meaning, Br. 20, is refuted by his acknowledgment on the very next page that the firearm type provisions were relocated to "a subsection that is separated from other parts of the statute," *id.* at 21: that feature creates a "presumption drawn from * * * structure" that a statute states sentencing factors, *Harris*, 536 U.S. at 554.

To escape the strong implication of the many revisions Congress made to Section 924(c)(1), O'Brien posits that Congress can alter the meaning of a statute once construed by this Court only by enacting a super-clear statement. See Br. 23 (suggesting that copying the language of the sentencing factor in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), "might" be sufficient to over-

come *Castillo*). But the cases O'Brien cites (Br. 18-19) stand for the far more modest propositions that technical amendments and codifications generally do not work substantive changes and that Congress does not radically alter the law through trivial changes in wording—that "Congress * * * does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).[1] Here, the substance of the change is not an "elephant": although the statutory changes are procedurally significant, Congress adhered to the substantive principle that certain especially dangerous weapons warrant enhanced punishment. And the means for making that change is not a "mousehole": the statute was entirely restructured, with new language added that unmistakably designates firearm type as a relevant factor once a defendant has been "convicted of a violation." 18 U.S.C. 924(c)(1)(B). To see this as a sentencing factor, a court need only "interpret [the statute's] language according to its natu-

---

[1] See *Grogan* v. *Garner*, 498 U.S. 279 (1991) (replacing the narrower term "judgments" with the broader term "liabilities" did not affect the principle that fraud judgments are nondischargeable in bankruptcy); *Director of Revenue* v. *CoBank ACB*, 531 U.S. 316, 323 (2001) (technical and conforming amendment); *Department of Commerce* v. *United States House of Reps.*, 525 U.S. 316, 343 (1998) (opinion of O'Connor, J., for three Justices) (doubting that Congress intended "arguably * * * the single most significant change in the method of conducting the decennial census since its inception * * * by enacting only a subtle change in phraseology"); *Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991) (amendment to Voting Rights Act of 1965, 42 U.S.C. 1973, using the word "representatives" did not repeal Act's coverage of judicial elections); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 317-318 (1985) (minor wording change made during codification of jurisdictional provisions into Title 28); see also Burgess Br. 16-17, 27 (citing *Finley* v. *United States*, 490 U.S. 545 (1989) (minor changes made during codification)).

ral meaning." *Morales* v. *TWA*, 504 U.S. 374, 385 n.2 (1992).[2]

2. Section 924(c)(1)'s language and structure show that firearm type is a sentencing factor

Notwithstanding respondents' attempts to downplay language and structure, those have been the primary and dispositive guides for this Court in interpreting Section 924(c)(1). See *Dean* v. *United States*, 129 S. Ct. 1849, 1853-1854 (2009); *Harris*, 536 U.S. at 552-554; *Castillo*, 530 U.S. at 124-125.[3] Those guides provide clear evidence of Congress's intent to make firearm type a sentencing factor.

Language. The first mention of firearm type in the statute is introduced by the language, "If the firearm possessed by a person *convicted of a violation* of this subsection—." 18 U.S.C. 924(c)(1)(B) (emphasis added). Because firearm type is a relevant consideration in the statute only *after* a defendant has been "convicted of a violation" (*i.e.*, found guilty by a jury of the elements of

---

[2] O'Brien takes out of context the government's suggestion in its brief in *Castillo* that the 1998 amendments intended no substantive change. See O'Brien Br. 22. That position cannot be divorced from the government's argument in *Castillo* that the pre-1998 version of the statute also made firearm type a sentencing factor. In that context, the government's statement reflected the view that the 1998 amendments only strengthened the case for treating firearm type as a sentencing factor. *Castillo* conceded that the 1998 amendments—at issue here—"suggest" a sentencing-factor interpretation, but found those amendments irrelevant to the meaning of the prior statute. 530 U.S. at 125.

[3] See also *Watson* v. *United States*, 552 U.S. 74, 78-79 (2007); *Muscarello* v. *United States*, 524 U.S. 125, 127-132 (1998); *United States* v. *Gonzales*, 520 U.S. 1, 4-11 (1997); *Bailey* v *United States*, 516 U.S. 137, 144-146 (1995); *Smith* v. *United States*, 508 U.S. 223, 228-229 (1993); *Deal* v. *United States*, 508 U.S. 129, 131-132 (1993).

the offense), firearm type must be a sentencing factor. See Gov't Br. 14.

Respondents' counterarguments miss the point entirely by discussing instead what "violation of this subsection" means. See Burgess Br. 11-13; O'Brien Br. 30. All parties agree that the principal paragraph of Section 924(c)(1)(A) states elements. Wherever else in "this subsection" one might find additional elements "of a violation" (there are no obvious candidates), the use of the past participle "convicted" makes quite clear they are not to be found in Subparagraph (B). And that is a compelling reason why, contrary to O'Brien's argument, Section 924(c)(1)(B) cannot be "read * * * as simply substituting the word 'machinegun' for the initial word 'firearm.'" Br. 29 (quoting *Castillo*, 530 U.S. at 124). As explained (Gov't Br. 14, 36), a defendant does not come within Subparagraph (B) until he has already been "convicted." And he is "convicted" when found guilty of the "complete crime" specified in the subprincipal paragraph of Section 924(c)(1)—"the basic federal offense of using or carrying a gun during and in relation to a violent crime or a drug offense." *Harris*, 536 U.S. at 552 (internal quotation marks and citation omitted).

The introductory language of Section 924(c)(1)(A) independently shows that firearm type is a sentencing factor, because it describes provisions like Section 924(c)(1)(B)(ii) as supplying "a greater minimum sentence," and not as defining a separate crime altogether. See Gov't Br. 15-16. Respondents do not attempt to square Section 924(c)(1)(A)'s reference to "greater minimum sentence[s]" with their fundamental view that the firearm-type provisions are not "greater minimum

sentence[s]" but rather create "greater offense[s]," O'Brien Br. 1.[4]

Structure. As emphasized (Gov't Br. 16-19), *Harris*'s conclusions about the structure of Section 924(c)(1) apply here with equal force; if anything, the structural reasons to presume that Clauses (B)(i) and (ii) state sentencing factors are even stronger than the reasons *Harris* gave for interpreting Clause (A)(ii) to state a sentencing factor.

Respondents, like the court of appeals below, dismiss Congress's structural overhaul of Section 924(c)(1) as being "simply * * * for ease of digestion." O'Brien Br. 34; see *id.* at 31-35; Burgess Br. 16-17; Pet. App. 9a. But ignoring statutory structure is contrary to this Court's precedent in general, and *Castillo*'s particular comment that the "statutory restructuring" here "suggest[s] a [sentencing factor] interpretation," 530 U.S. at 125. Respondents' focus on legislative drafting technique betrays a misunderstanding of why structure matters. Structure is not important "for ease of reading," Pet. App. 9a; it is important because it reinforces Congress's intended meaning. Structural choices reveal how the parts of the statute interact and function in practice.

---

[4] O'Brien suggests that the language here is not clear enough to designate firearm type as a sentencing factor because one can imagine language that, in his view, would be clearer. See Br. 20 & n.4, 23. But "it is always possible to construct through hindsight an alternate structure for a statute with alternative wording that would render it more clear." *Brueswitz* v. *Wyeth Inc.*, 561 F.3d 233, 246 (3d Cir. 2009), petition for cert. pending, No. 09-152 (filed Aug. 4, 2009). Cf. *United States* v. *Hayes*, 129 S. Ct. 1079, 1085 (2009) (holding that the domestic relationships specified in 18 U.S.C. 921(a)(33)(A) are not required elements of predicate offense, even though "lawmakers might have better conveyed their intent" through structural and punctuation changes).

Here, the "lengthy principal paragraph listing the elements of a complete crime" is in a separate sentence and separate subparagraph from the firearm-type provisions, which "explain how defendants are to 'be sentenced.'" *Harris*, 536 U.S. at 552 (quoting 18 U.S.C. 924(c)(1)(A)). That structural separation informs the reader that the two perform the distinct functions of identifying elements for the jury and identifying sentencing factors for the judge. This in turn results in an overall orderly progression from elements in the principal paragraph of Subparagraph (A), then to sentencing factors in the balance of Subparagraph (A) through Subparagraph (C), and finally to technical considerations about the sentence in Subparagraph (D). That structure is a practical aid to applying the statute because it allows the reader (*e.g.*, a district judge) to use Section 924(c)(1) as step-by-step instructions for charging a jury, then determining the appropriate statutory sentencing range if the defendant is convicted, and finally memorializing the actual sentence.[5]

Respondents offer two other replies. First, they assert that the government's structural argument is one "that this Court rejected in *Jones*: namely, that the statute contains a principal paragraph followed by the word 'shall,' and finally separate subsections" that state sentencing factors. Burgess Br. 15 (alteration and some

---

[5] Burgess's observation (Br. 17 & n.8) that some federal criminal statutes are not organized in this way is beside the point. Plainly there is no rule that statutes must progress from elements to sentencing factors—especially not when a statute has (as those cited by Burgess do) clear internal headings and cross-references explaining the relationship among its provisions. But when (as here) a statute's language and structure point to such a progression, common sense suggests that was what Congress intended.

internal quotation marks omitted); see O'Brien Br. 34-35. But it would be more germane to say that the government's structural argument here is the one the Court accepted in *Harris* regarding this very statute. Second, respondents assert (with no citation) that the case for treating firearm type as a sentencing factor would be strengthened by moving it *closer* to the elements of the offense (indeed, by relocating it to the same sentence and subparagraph as the offense elements). See Burgess Br. 14-15; O'Brien Br. 35. But the opposite is true: it is Subparagraph (B)'s structural and linguistic separation from the elements in the principal paragraph of Subparagraph (A) that should give the Court confidence that firearm type is not itself an element. See Gov't Br. 17-19.

In the end, rather than glean meaning from Congress's structural choices as *Harris* commands, respondents dismiss Section 924(c)(1) as a "jumble of widely varying provisions" (Burgess Br. 17) that merely reflects the happenstance of how things "ended up" (O'Brien Br. 35). But the current version of the statute is the product of a wholesale structural revision by Congress, in which firearm type was shifted from raising a fixed sentence to increasing the minimum sentence within a much larger authorized range. That significant alteration makes it all the more likely that Congress purposefully selected a structure that would implement a sentencing factor design, as Section 924(c)(1) does.

3. Secondary factors such as tradition and sentence length support treating firearm type in Section 924(c)(1)(B) as a sentencing factor

Respondents overemphasize secondary interpretive guides like the traditional treatment of firearm type and

the length of the sentence at issue. As previously explained (Gov't Br. 21-22), reliance on such considerations is appropriate only when the statute's language and structure "do[] not justify any confident inference," *Jones* v. *United States*, 526 U.S. 227, 234 (1999). Even so, these secondary considerations support treating firearm type as a sentencing factor here.

Tradition. As we explained in our opening brief (at 22-24), the enhanced minimum sentences for particularly dangerous firearms lie at the intersection of two well-established traditions, neither of which was implicated by the version of the statute construed in *Castillo*: the use of sentencing factors to constrain the judge's discretion through mandatory minimum sentencing laws, and the Sentencing Guidelines' treatment of firearm type as a sentencing factor for firearms offenses. Respondents do not dispute the former; indeed, they point to no federal statute (and we are aware of none, see *id.* at 37) that requires a jury finding to raise the minimum permissible sentence within an authorized range.[6]

Nor do respondents offer a sound reason to ignore the Sentencing Guidelines' tradition of treating firearm type as a sentencing consideration. Tradition matters when statutory language and structure are "unclear" because "statutory drafting occurs against a backdrop

---

[6] O'Brien observes (Br. 25) that Section 924(c)(1)(A)(i) provides for a minimum sentence based exclusively on offense elements, but that section simply states (as any penal statute must) the authorized sentencing range for the offense it describes. What places Section 924(c)(1) in the sentencing factor tradition is that each of the *aggravated* ways of committing the offense triggers a higher minimum sentence within that authorized range (rather than an "increase [in that] penalty range," *Jones*, 526 U.S. at 233).

* * * of traditional treatment of certain categories of important facts," and it is therefore a "fair assumption that Congress * * * intend[ed]" to follow traditional practices that prevailed at the time of drafting. *Jones*, 526 U.S. at 234. O'Brien suggests (Br. 26 n.7) that the Guidelines would have been just as relevant in construing the 1986 version of Section 924(c)(1) in *Castillo*. But Congress could not have legislated "against a backdrop" of the Guidelines in 1986 because the Guidelines were not effective until late 1987, see Sentencing Guidelines Ch. 1, Pt. A.2 (1987). By contrast, in 1998 the Guidelines undeniably embodied the dominant federal sentencing tradition.

Burgess (see Br. 23-24) is mistaken to infer anything from the absence of any mention of the Guidelines in *Jones*. Although the government argued in *Jones* that the Guidelines' tradition of treating serious bodily injury as a sentencing consideration supported its reading of the statute at issue (see Gov't Br. at 23-25, *Jones*, *supra*), this Court's "search for comparable examples" turned up better parallels in other statutes, and the Court did not need to address the Guidelines, *Jones*, 526 U.S. at 235-236.

Here, by contrast, the Guidelines provide the better parallel. Many of the statutes Burgess offers as parallels (see Br. 22-23 & nn.11-12) are designed to criminalize certain acts or omissions only when they involve a particular type of firearm; that tailored purpose cannot easily be served without making the particular type of firearm an offense element. By contrast, Section 924(c)(1) criminalizes certain acts involving *any* firearm, and thereby serves Congress's objective of combating the dangerous combination of *all* firearms with drugs or violent crime, see Gov't Br. 32. Further distinctions

among Section 924(c)(1) offenders can sensibly be drawn by the judge at sentencing.

The great majority of offenses under 18 U.S.C. 922, 18 U.S.C. 924, and 26 U.S.C. 5861 are drawn broadly to reach any "firearm" as defined in the respective statutes; none of those broad offenses makes the involvement of a specific type of firearm an aggravated offense.[7] But every one is subject to Sentencing Guidelines § 2K2.1, which directs the judge to consider the particular type of firearm at sentencing. Construing firearm type in Section 924(c)(1)(B) as a sentencing factor is consistent with that tradition.

Length. Only "after considering traditional interpretive factors" and finding itself "genuinely uncertain as to Congress's intent" would this Court "assume a preference for traditional jury determination." *Castillo*, 530 U.S. at 131. As shown above and in our opening brief, no "genuine[] uncertain[ty]" exists about Congress's intent here. The length of the sentence enhancement does not change matters. Congress has authorized comparably large sentence enhancements on the basis of judge-found facts for conduct that is as heinous and dangerous as using a machinegun in connection with violent crime. See Gov't Br. 26-29. Respondents say nothing in response to the vast majority of the enhancements cited in

[7] Burgess asserts that "status as a machinegun" is "an element with respect to * * * violations set forth in 26 U.S.C. 5861(a) through (j)." Br. 22. But all "firearm[s]" covered by 26 U.S.C. 5845(a)—machineguns included—are treated alike; different firearms do not define different aggravated offenses, and what matters here is whether the fact is made an element of an aggravated offense. See, *e.g.*, *Jones*, 526 U.S. at 235 ("[S]erious bodily injury has traditionally been treated * * * as defining an element of the offense of aggravated robbery."); *Harris*, 536 U.S. at 553 ("[B]randishing and discharging affect the sentences for numerous federal crimes.").

our opening brief; Burgess argues that two in particular are actually not sentencing factors, but offers no judicial authority (aside from dissenting opinions) in support of his argument, see Br. 26.

Respondents seem to embrace the proposition that a ten-year minimum sentence—like that provided in Clause (B)(i) for certain types of firearms—is what "one would expect to find in provisions aimed at identifying sentencing matters for a judge to consider." Burgess Br. 26 (citing *Harris*, 536 U.S. at 554). Clauses (B)(i) and (B)(ii) are similarly worded and identically structured, however, and respondents fail to explain what will become of Clause (B)(i) if this Court accepts their invitation to decide the status of Clause (B)(ii) based on the length of sentence it prescribes. Perhaps respondents would argue that the nearly identical provisions mean diametrically opposite things. The more sensible conclusion, though, is that Congress intended Clause (B)(ii)—like every other provision around it—to be a sentencing factor.[8]

B. Treating Firearm Type As A Sentencing Factor Is Consistent With Constitutional Limitations On Mandatory Minimum Sentences

Congress's decision in Section 924(c)(1) to impose an enhanced minimum sentence based on the sentencing

---

[8] With respect to other considerations, the parties agree (Gov't Br. 29, Burgess Br. 27-28, O'Brien Br. 28-29) that the 1998 legislative history is silent on the question presented. As for policy, we explained in our opening brief why firearm type in particular was a reasonable subject for Congress to commit to the sentencing judge in the context of this statute. Br. 31-34. O'Brien's general endorsement of jury determinations (Br. 26-27) would apply equally to every fact in every criminal case; it says nothing about why firearm type in particular cannot fairly be entrusted to the judge in a Section 924(c)(1) case.

judge's finding of particular firearm type is consistent with the Fifth and Sixth Amendments.

1. Mandatory minimum sentences raise no Sixth Amendment concern

"[M]andatory minimums * * * are not a concern of the Sixth Amendment." *Rita* v. *United States*, 551 U.S. 338, 373 n.2 (2007) (opinion of Scalia, J.) (citing *Harris*, 536 U.S. at 568-569). This Court has never wavered from that clear and firmly established rule, and respondents offer no valid reason to reconsider it.

a. In *McMillan*, *supra*, this Court "rejected" a rule "that the Constitution requires any fact increasing the statutory minimum sentence to be accorded the safeguards assigned to elements." *Harris*, 536 U.S. at 555. No subsequent case has disturbed that holding:

- In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that the Sixth Amendment requires that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. *Apprendi* expressly "d[id] not overrule *McMillan*," recognizing the force of *stare decisis* considerations, *id.* at 487 n.13.
- *Harris* reaffirmed *McMillan* and held that *Apprendi*'s rule does not apply to judicial factfinding that increases a defendant's minimum sentence within an authorized range. See *Harris*, 536 U.S. at 568 (opinion of the Court "reaffirming *McMillan*"); see also *id.* at 565, 567-568 (plurality opinion); *id.* at 569, 572 (Breyer, J., concurring in part and concurring in the judgment). The *Harris*

plurality explained that, unlike the "prevailing historical practice" of submitting to a jury factual matters that would increase a defendant's sentence beyond the otherwise-applicable statutory maximum, there was "no comparable historical practice of submitting facts increasing the mandatory minimum to the jury, so the *Apprendi* rule d[oes] not extend to those facts." *Id.* at 563.

- *Ring* v. *Arizona*, 536 U.S. 584, 604 n.5 (2002), reiterated the Court's conclusion from *Harris* that "the distinction between elements and sentencing factors continues to be meaningful as to facts increasing the minimum sentence."
- *Blakely* v. *Washington*, 542 U.S. 296, 305 (2004), applied *Apprendi* to invalidate an enhancement under a state sentencing guidelines scheme that produced "a sentence greater than what state law authorized on the basis of the verdict alone." *Blakely* expressly distinguished *McMillan* on the ground that it "involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact." *Id.* at 304.
- *United States* v. *Booker*, 543 U.S. 220, 232 (2005), and *Cunningham* v. *California*, 549 U.S. 270, 281-282 (2007), both adhered to the principle that *Apprendi*'s rule applies only to factfinding that affects a defendant's maximum sentence.[9]

---

[9] Amicus Center on the Administration of Criminal Law is quite wrong to claim that *Booker* extends *Apprendi* to any law "establishing what punishment is available by law," Br. 17 (quoting *Apprendi*, 530 U.S. at 519 (Thomas, J., concurring)). Justice Stevens's opinion is clear that the mandatory Sentencing Guidelines violated the Sixth Amendment not because they specified sentencing ranges generally,

McMillan and *Harris*'s rule is correct and forms a deeply rooted part of this Court's Sixth Amendment jurisprudence.

b. Burgess (see Br. 36-39) and his amici nonetheless advocate overruling *McMillan* and *Harris*. Even apart from the correctness of those decisions, *stare decisis* commands adherence to their rule. "*Stare decisis* is not an inexorable command, but the doctrine is of fundamental importance to the rule of law," and this Court "will not overrule a precedent absent a special justification." *Harris*, 536 U.S. at 556-557 (plurality opinion) (internal quotation marks and citations omitted). No such "special justification" exists here. *McMillan* and *Harris* offend no historical practices, and they are entirely consistent with the rule of *Apprendi*. And a rule permitting legislatures to increase minimum sentences within an authorized range based on judge-found facts is clear and workable.

"*Stare decisis* has special force when legislators or citizens have acted in reliance on a previous decision, for in this instance overruling the decision would * * * require an extensive legislative response." *Hubbard* v. *United States*, 514 U.S. 695, 714 (1995) (opinion of Stevens, J.) (internal quotation marks and citation omitted). As this Court is well aware, *McMillan* and *Harris* have engendered considerable reliance at both the federal and the state level.[10] Section 924(c)(1) itself exem-

---

but because "the 'statutory maximum' for *Apprendi* purposes" in a guideline system is "the maximum sentence a judge may impose [within the system] solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Booker*, 543 U.S. at 232 (quoting *Blakely*, 542 U.S. at 303) (emphasis omitted).

[10] See, *e.g.*, *Harris*, 536 U.S. at 567-568 (plurality opinion) (noting that "[l]egislatures and their constituents have relied upon *McMillan* to

plifies that reliance; the 1998 revision took it outside what became *Apprendi*'s rule and placed it inside *McMillan*'s. After *Harris*, Congress has continued to enact mandatory minimum sentencing laws. See, *e.g.*, Prevention of Terrorist Access to Destructive Weapons Act of 2004, Pub. L. No. 108-458, Tit. VI, Subtit. J, §§ 6903-6906, 118 Stat. 3770-3773 (adding or amending 18 U.S.C. 175c, 2332g, 2332h and 42 U.S.C. 2722). Respondents offer no adequate justification to overrule *McMillan* and *Harris*.

2. Treating the firearm-type provisions of Section 924(c)(1)(B) as sentencing factors is consistent with the Due Process Clause

Respondents argue (O'Brien Br. 52-55, Burgess Br. 33-39) that Section 924(c)(1)(B)(ii) cannot be considered a sentencing factor because imposing a 30-year sentence based on judicial factfinding would violate the Due Process Clause by "diluting the prosecution's burden of proof." O'Brien Br. 52. That is incorrect.

a. This Court has never held that the Due Process Clause is violated when a judge makes findings by a preponderance of the evidence that raise a minimum sentence within an authorized range. To the contrary, the Court rejected such claims in *McMillan* and *Harris*. Respondents nonetheless would transform *McMillan*'s observation that the statute there gave "no impression

---

exercise control over sentencing through dozens of statutes like the one the Court approved in that case"); see also *id.* at 570 (Breyer, J., concurring in part and concurring in the judgment) (recognizing that "[d]uring the past two decades, * * * mandatory minimum sentencing statutes have proliferated in number and importance."), *Apprendi*, 530 U.S. at 487 n.13 (noting the Court was "[c]onscious of the likelihood that legislative decisions may have been made in reliance on *McMillan*").

of having been tailored to permit the [sentencing factor] finding to be a tail which wags the dog of the substantive offense," 477 U.S. at 88, into an affirmative arithmetical command that the Due Process Clause is offended whenever a "major portion of a defendant's sentence is attributable to a particular sentencing factor rather than to the offense itself," O'Brien Br. 54.

Harris itself rejects that view of the Fifth Amendment. See 536 U.S. at 565 (plurality opinion) ("[O]nce the jury finds [the elements of the offense], *Apprendi* says that the defendant has been convicted of the crime; the Fifth and Sixth Amendments have been observed."). And a majority of this Court has squarely rejected—in a decision rendered since *McMillan* and *Harris*—the argument that the line between sentencing factor and offense element can be governed by such an amorphous and "subjectiv[e]" standard as whether the sentencing factor appears to be a "tail" that "wags the dog" of the substantive offense. See *Blakely*, 542 U.S. at 307 (quoting *McMillan*, 477 U.S. at 88); *id.* at 311 n.13. Rather, whether the Constitution requires a particular fact to be found by a jury is determined by "*Apprendi*'s bright-line rule." *Id.* at 308. That rule does not apply to the enhanced minimum sentence prescribed by Section 924(c)(1)(B)(ii) because the underlying offense carries a potential life sentence and the presence of a machinegun simply increases the minimum sentence within that range. Where *Apprendi* does not apply, the Constitution commits concerns about such schemes to the "'structural democratic constraints [that] exist to discourage legislatures from' pernicious manipulation of the rules" defining offenses and assigning burdens of proof. *Oregon* v. *Ice*, 129 S. Ct. 711, 719 (2009) (quoting *Apprendi*, 530 U.S. at 490 n.16).

b. Section 924(c)(1)(B)(ii) bears no resemblance to the extreme hypotheticals that this Court has offered to illustrate the concern raised by sentencing factors that overshadow the offense. See, *e.g.*, *Blakely*, 542 U.S. at 306 (hypothesizing a murder prosecution in the guise of a sentencing proceeding for a traffic offense committed while fleeing the death scene). All would agree that the actions described in the principal paragraph of Section 924(c)(1)(A) are wrongful and deserving of serious punishment; indeed, Congress authorized punishment up to life imprisonment. The firearm type provisions of Section 924(c)(1)(B) merely categorize particularly dangerous forms of the offense by looking closely at an element—the firearm—that has already been proved to the jury's satisfaction. In other words, Congress "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor." *Harris*, 536 U.S. at 568 (quoting *McMillan*, 477 U.S. at 89-90).

C. This Court Should Reject Or Not Decide The Other Statutory And Constitutional Claims Respondents Raise

Respondents and their amici press certain statutory and constitutional issues that were not raised or decided by the courts below and that are not within the question presented. This Court should not address those claims, but if it does, it should reject them.

1. This Court cannot and should not decide respondents' putative as-applied Sixth Amendment challenge

Respondents, joined by their amici, contend that basing a sentence under Section 924(c)(1)(B)(ii) on a judge's finding of a machinegun would violate their Fifth and Sixth Amendment rights as interpreted in *Apprendi*, *supra*. See O'Brien Br. 37-52, Burgess Br. 40-43. In

particular, respondents contend that the applicable statutory maximum for *Apprendi* purposes is not Section 924(c)(1)'s statutory maximum of life imprisonment, but instead the maximum hypothetical sentence that could be imposed under 18 U.S.C. 3553(a) in the absence of judicial factfinding and upheld on appeal as reasonable. See generally *Rita*, 551 U.S. at 368-381 (opinion of Scalia, J.). In respondents' view, the 30-year minimum sentence prescribed by Section 924(c)(1)(B)(ii) exceeds that hypothetical level, and, they claim, it therefore cannot be imposed based on the sentencing judge's finding that the Cobray MAC-11 was a machinegun.

The Court should refuse to reach respondents' contention. Doing so would require the Court to adjudicate an as-applied challenge it has never recognized, to a sentence that has not been imposed, based on a set of facts not presently determined, all without the benefit of decisions from the courts below. That said, if the Court were to address respondents' putative as-applied challenge, it should fail on the merits.

a. This Court need not reach the question. It was not pressed or passed upon by the courts below and is not part of the question presented. The Court "ordinarily do[es] not decide in the first instance issues not decided below," *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) (citation omitted), and it would be extraordinary for the Court to take up a case-specific constitutional question the courts below never confronted. If the government prevails in this Court, respondents could raise their challenge on remand. See, *e.g.*, *id.* at 168-171 (remanding for lower courts to consider in the first instance an alternative claim not previously decided, beyond the question presented, and subject to limited briefing in this Court); *FCC* v. *Fox Televi-*

sion Stations, Inc., 129 S. Ct. 1800, 1819 (2009) (remanding for consideration of constitutional claims by lower court in the first instance). And because proceedings on remand will not necessarily result in imposition of the Section 924(c)(1)(B)(ii) sentence—respondents could be acquitted at trial, or the district court might reject the government's proof of the Cobray's characteristics—it is possible that no court will have to reach respondents' constitutional challenge.

b. Respondents' challenge is not ripe at this point in the proceedings. An as-applied challenge asserts that "under the facts of [a] specific case[] * * * applying [a statute] would produce unconstitutional results." *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 (2005) (citation omitted). Any as-applied challenge would require determining what sentence would be the maximum "reasonable" sentence based on "the facts found by the jury or admitted by the defendant." Burgess Br. 41 (quoting *Rita*, 551 U.S. at 372 (opinion of Scalia, J.)). But it is impossible to know now what the "facts found by the jury or admitted by the defendant" would be should respondents challenge some future sentence. While respondents admitted certain facts at their guilty plea hearing, they raise a serious prospect that they might withdraw their guilty pleas on remand. See Burgess Br. in Opp. 15-16; O'Brien Br. in Opp. 23-25; see also Pet. Reply Br. 10-11. Whatever happened next—perhaps a trial, perhaps an open guilty plea, perhaps a plea agreement —would make a new record of admissions or jury findings different from the current record. Thus, a pronouncement from this Court about the constitutionality of a 30-year sentence on this record would be entirely advisory.

c. If this Court reaches the issue, it should conclude that respondents' putative as-applied challenge has no basis in the Sixth Amendment. Respondents' challenge posits a system of reasonableness review in which "appellate courts, in case-by-case fashion," construct maximum reasonable sentences based on the Section 3553(a) sentencing criteria to limit the discretion of the sentencing judge. *Rita*, 551 U.S. at 372 (opinion of Scalia, J.). But reasonableness review does not generate predictable maximum sentences on which an offender can rely when embarking on a crime.

The *Apprendi* rule was based on the idea that a defendant, before he engages in conduct, is entitled to know the "certain pains" to which his actions expose him under the law and to enjoy the "procedural safeguards designed to protect [the defendant] from unwarranted pains." 530 U.S. at 476 (citation omitted). Thus, the Court held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the *prescribed range of penalties* to which a criminal defendant is exposed." *Id.* at 489 (emphasis added; citation omitted; brackets in original). Later cases reiterated the theme that a defendant is entitled to rely on the maximum penalty threatened by the law when committing a crime or pleading guilty.[11]

---

[11] See *Blakely*, 542 U.S. at 309 ("In a system that says the judge may punish burglary with 10 to 40 years, every burglar *knows* he is risking 40 years in jail.") (emphasis added); *id.* at 311 (describing the pre-*Apprendi* regime as one "in which a defendant, *with no warning in either his indictment or plea*, would routinely see his maximum potential sentence balloon") (emphasis added); *Harris*, 536 U.S. at 566 (plurality opinion) ("The Fifth and Sixth Amendments ensure that the defendant 'will never get *more punishment than he bargained for* when he did the crime.'") (emphasis added) (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

But the hypothetical maximum reasonable sentence available in a system that includes appellate review for substantive reasonableness is not the sort of "certain pains" on which an offender can rely, because the existence of that appellate check creates no ascertainable upper limit on the legally available punishment. The purpose of appellate review certainly is not to create such an entitlement. See *Rita*, 551 U.S. at 354 ("In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur."). Nor would it be possible for a would-be offender to anticipate the particular combination of facts and policy judgments on which the sentencing court would rely in determining the appropriate sentence—let alone predict the maximum sentence that an appellate court might ultimately conclude is reasonable based on those fact- and policy-based justifications.

In considering extensions of the *Apprendi* rule, this Court has looked to "historical practice" and the degree of intrusion on sovereign prerogatives. *Ice*, 129 S. Ct. at 717. Here, no "historical practice" supports treating a deferential appellate check on unreasonable sentences as if it were a predictable and uniform legal maximum sentence for Sixth Amendment purposes. And extending *Apprendi* to achieve that result would effectively preclude legislatures from relying on appellate review to weed out excessive sentences, and force them instead either to abandon the appellate check or grant jury trials based on appellate rulings—an outcome that would "make scant sense," put unnecessary "straightjacket[s]" on governments, and "be difficult * * * to administer." *Id.* at 719.

If as-applied Sixth Amendment challenges were permissible, no sentencing judge would be able to ascertain the upper limit of her authority; every case would have to be considered on its own facts. Nor could any coherent body of precedent develop to guide sentencing judges. Each hypothetical maximum reasonable sentence would depend on the unique set of facts proved to the jury or admitted by the defendant and the sentencing court's application of its own policy judgment—all filtered through abuse-of-discretion appellate review. The resulting chaos would undermine the remedy the Court fashioned in *Booker*, *supra*, and reaffirmed in *Rita*, *supra*, and *Gall* v. *United States*, 552 U.S. 38 (2007), and it would deprive sentencing courts of their constitutionally permitted latitude "to take account of factual matters not determined by a jury and to increase the sentence in consequence," *Rita*, 551 U.S. at 352.

d. All that aside, such a challenge would fail on the facts here. In brief, the "facts * * * admitted by the defendant[s]" for *Apprendi* purposes are these:

- Respondents planned with their confederates for several months to rob an armored car.
- Respondents gained access to three stolen cars and three firearms (a Sig-Sauer pistol, a Cobray MAC-11, and an AK-47) as part of their plan.
- Following through on their plan, respondents assaulted an armored car and its two guards while brandishing those firearms on a weekday morning in a commercial area of a major city.
- Respondents aborted only because one of the guards escaped their control.

App., *infra*, 1a-5a. In addition, the fact of a prior conviction is not subject to *Apprendi*, see 530 U.S. at 488-490, and each respondent has a fair history of misdemeanor and felony convictions, see C.A. Supp. App. 13-16 (O'Brien), 57-66 (Burgess). Imposing a 30-year sentence on repeat offenders for using multiple firearms in a dangerous, threatening, and premeditated way would be within the sentencing judge's discretion, irrespective of whether one of the firearms was a machinegun.

c. Finally, the Court should reject O'Brien's invitation to invoke "the doctrine of constitutional avoidance," Br. 37, to construe Section 924(c)(1)(B)(ii) to state an element in all cases. For the canon to apply, "the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998). But as we have explained, when this statute is carefully considered, it is not ambiguous at all.

The avoidance "canon is followed out of respect for Congress, which we assume legislates in light of constitutional limitations." *Almendarez-Torres*, 523 U.S. at 238 (citation omitted). Congress did so in 1998 by respecting *McMillan*'s assurance that elevated mandatory minimum sentences within an authorized range could be imposed on the basis of judicial factfinding. See *Harris*, 536 U.S. at 556 ("The statute at issue in this case was passed when *McMillan* provided the controlling instruction, and Congress would have had no reason to believe it was approaching the constitutional line by following that instruction."). Constitutional law is to the same effect today; the Court is not confronted by a "grave and doubtful" constitutional issue, *id.* at 555 (citation omitted), if it construes Section 924(c)(1)(B)(ii) as Congress wrote it.

2. *This Court should reject or refuse to decide O'Brien's claim that the government must prove he knew the Cobray was a machinegun*

O'Brien contends that, irrespective of the answer to the question presented, Section 924(c)(1)(B)(ii) requires the government to prove his knowledge that the Cobray was a machinegun—something it concededly cannot do. See O'Brien Br. 13-17. This Court should refuse to reach that issue because it is not properly presented here, but if it does decide the question, it should resolve it against O'Brien.

a. This Court should not reach the knowledge issue because, as O'Brien concedes, it is not part of the question presented (see Pet. I; O'Brien Br. 15), nor was it pressed or passed upon in the courts below. See pp. 19-20, *supra*. O'Brien's suggestions (Br. 13, 17) that the Court avoid answering the question presented or dismiss the writ as improvidently granted are particularly inappropriate given that he did not raise the knowledge issue in his brief in opposition, notwithstanding the government's pointed discussion of the issue in its petition (at 18-19). See S. Ct. Rule 15.2.

O'Brien describes the knowledge issue as "analytically distinct from the question [presented]." Br. 15. But in fact, this Court's decision in *Dean* suggests that resolution of the sentencing factor/element question is a prerequisite to intelligent analysis of the knowledge issue. *Dean* considered whether Section 924(c)(1)(A)(iii)'s enhancement when "the firearm is discharged" required proof of the defendant's mental state. *Dean* held that it did not, partly based on the tradition of imposing criminal punishment for the unintended consequences and unknown circumstances of otherwise unlawful conduct. See 129 S. Ct. at 1855-1856. That analy-

sis is appropriate when a sentencing factor is at issue (because the offense elements establish the otherwise unlawful conduct), but it may carry less force when an element is at issue (because the element may itself define the unlawful conduct). The Court should define the nature of machinegun enhancement before considering whether it requires proof of a mental state.

b. *Dean* also demonstrates why O'Brien's position on the knowledge issue is wrong on the merits. Like Clause (A)(iii) at issue in *Dean*, Clause (B)(ii) contains no express mental state, so it would be inappropriate to imply one. See 129 S. Ct. at 1853. Also like Clause (A)(iii), Clause (B)(ii) is phrased in the passive voice, suggesting the statute is unconcerned with the knowledge or intentions of the criminal actor. See *ibid.* Furthermore, *Dean* found it unnatural to "extend" the mental state of the principal paragraph of Section 924(c)(1)(A) "all the way down" to modify Clause (A)(iii), see *id.* at 1854; it would be even more unnatural to extend it all the way to Clause (B)(ii).

O'Brien's reliance (Br. 14-15) on *Staples* v. *United States*, 511 U.S. 600 (1994), is misplaced, because firearm type plays quite a different role in 26 U.S.C. 5861(d), the firearm-registration statute at issue in *Staples*. There, if the government were not required to prove knowledge of the characteristics that made the object in question a machinegun, committing the offense "would require the defendant to have knowledge only of traditionally lawful conduct," *Staples*, 511 U.S. at 618, effectively "dispens[ing] with *mens rea*," *id.* at 619. The application of that principle here is that the government must prove a defendant's knowledge of the characteristics that made the Cobray a "firearm" under 18 U.S.C. 921(a)(3), not a "machinegun" under 18 U.S.C. 921(a)(23)

and 26 U.S.C. 5845(b). And independent statutory elements assure that a defendant subject to Clause (B)(ii) is culpable—as in *Dean*, he "is already guilty of unlawful conduct twice over: a violent or drug trafficking offense and the use, carrying, or possession of a firearm in the course of that offense." 129 S. Ct. at 1855.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

ELENA KAGAN
Solicitor General

FEBRUARY 2010

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 1:05-cr-10183-MLW

UNITED STATES OF AMERICA

v.

DENNIS QUIRK AND MARTIN O'BRIEN AND
ARTHUR BURGESS

Monday, Apr. 2, 2007

[Plea Hearing]

---

* * * * *

[60]

* * * * *

THE COURT: All right. Now, the government is going to provide a factual basis. I'm quite familiar with the factual basis because of the trial memo and the preparation for trial, the other pleas, I take it, but I think it probably would be prudent to have the government summarize what the evidence would have been if we went to trial and then I'll ask each of the defendants if he agrees with the government's summary of what he did.

MR. RICHARDSON: Yes, your Honor.

Had the case gone to trial, the evidence would have shown that around the spring of 2005, Dennis Quirk, Martin O'Brien, Arthur Burgess and Patrick Lacey made plans to rob an armored car. They made arrangements through the defendant Quirk to use Jason Owens's room at 311 Pearl Street in Malden, Massachusetts as a place to rendezvous after the robbery.

In around late April and early May of 2005, they twice set up to rob an armored car as it made a delivery to a Citizen's Bank branch located in Charlestown, but both times circumstances interfered and the robbery did not go forward on either of those occasions .

The evidence would have shown that during the week of June 6, 2005, defendant Quirk spoke with Jason Owens and again arranged to use his room at 311 Pearl Street as a place to rendezvous after an armored car robbery. The evidence would have shown that the defendants Quirk, O'Brien and Burgess, together with Patrick Lacey, then made preparations to rob a Loomis Fargo & Company armored car as it made a delivery to the Citizen's Bank branch located on Hanover Street in the North End of Boston on June 16th, 2005. The evidence would have shown that Loomis Fargo & Company operated throughout the United States and in foreign countries and that Loomis Fargo & Company would have borne at least part of the amount of the loss occasioned by a robbery. The evidence would have shown that as part of the preparation for committing this robbery, the defendants planned to use three stolen vehicles, a blue minivan, a red Buick, and a white van.

The evidence would have shown that on the morning of June 16th, 2005, Patrick Lacey drove a red Buick to the North End of Boston and defendants O'Brien, Quirk

and Burgess, armed with the AK-47 rifle described in the indictment and the Cobray 9 millameter pistol described in the indictment and the Sig Sauer pistol described in the indictment, drove in the blue minivan to the North End of Boston. The evidence would show that they made several loops around the block that included the location of the Citizen's Bank and then when the armored car had arrived, the evidence would show that Lacey drove by in the Buick as the defendants Quirk, O'Brien and Burgess pulled up to the blue minivan with the rear slider door open.

The evidence would show that armed with the firearms, they ordered the two guards that were there to get down on the ground. The evidence would show that one did so, but the other took cover and then ran down the sidewalk. The evidence would show that one did so, but the other took cover and then ran down the sidewalk. The evidence would show that the defendant O'Brien, who was driving the minivan, took off without their having obtained any money or other property.

The evidence would show that he followed Patrick Lacey in the red Buick over to Cooper Street, where they abandoned the blue minivan. The evidence would show that they all got into the Buick. O'Brien drove them to Everett where they abandoned the Buick and got into a white van that they had waiting, and the evidence would show that they all then drove to 311 pearl Street in Malden.

The evidence would show that the defendant O'Brien dropped the defendant Quirk, the defendant Burgess, and Patrick Lacey off and then, went to park the van. The evidence would show that they went inside and that

the defendant O'Brien arrived somewhat later after having parked the van.

The evidence would show that they took off clothing. Defendants Quirk and Burgess, in particular, took off bullet proof vests, and that the vests, some of the clothing, and the three firearms described in the indictment were put into a black Nike bag, which was put into Jason Owens's closet, together with magazines and ammunition for each of the weapons.

The evidence would show that the defendant Quirk was the first to leave 311 Pearl Street, was seen by law enforcement as he left, and ended up being arrested a few minutes later at the nearby T station. The evidence would show that the defendants Burgess, O'Brien, and Patrick Lacey left a short while later, unobserved by law enforcement, and took a cab away from 311 Pearl Street.

The evidence would show that the FBI executed a search warrant at 311 Pearl Street later that day and recovered a black Nike bag with the bullet proof vests, the three firearms described in the indictment, and the ammunition and magazines for those firearms. The evidence would have shown that each of the three firearms described in the indictment is a real firearm and that the ammunition described in the indictment is real ammunition.

The evidence would have shown that each of defendant Quirk and defendant Burgess, prior to June 16th of 2005, had been convicted in a court of a crime punishable by a term of imprisonment exceeding one year and the evidence would have shown that each of the three firearms described in the indictment and all of the ammunition described in the indictment was made outside of Massachusetts.

THE COURT: Do you agree with the government's summary of what you did, what you knew?

MR. BURGESS: Yes.

MR. O'BRIEN: Yes.

MR. QUIRK: Yes.

THE COURT: And how do you now each wish to plead to the charges against you, guilty or not guilty?

MR. BURGESS: Guilty.

MR. O'BRIEN: Guilty.

MR. QUIRK: Guilty.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 21 2010
OFFICE OF THE CLERK

No. 08-1569

B699

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF RESPONDENTS

ANTHONY S. BARKOW
DAVID B. EDWARDS
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
110 West Third St., Suite 214
New York, NY 10012
(212) 998-6612

DOUGLAS A. BERMAN
THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW
55 West 12th Avenue
Columbus, OH 43210
(614) 688-8690

SAMUEL L. FEDER*
JESSICA RING AMUNSON
NICHOLAS O. STEPHANOPOULOS
CHRISTOPHER J. DEAL
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
sfeder@jenner.com
(202) 639-6000

* *Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. *Booker* Dictates that All Facts that, as a Matter of Law, Increase a Defendant's Sentencing Range Must Be Found by the Jury or Admitted by the Defendant 4

A. The Court's Decisions in *McMillan* and *Harris* Do Not Require a Different Result 7

1. *McMillan* Did Not Address the Relationship Between Mandatory Minimums and the Right to Trial by Jury 8

2. As Five Justices in *Harris* Concluded, and as *Booker* Makes Clear, *Apprendi* Logically Applies to Facts that Trigger Mandatory Minimums. 11

II. Applying *Apprendi* to Mandatory Minimums Is Consistent with the Sentencing Guidelines and Modern Sentencing Reform 19

A. Taking *Apprendi* and *Booker* to Their Logical Conclusions and Treating Mandatory Minimum Sentencing Provisions as Offense Elements Furthers the Goals of Modern Sentencing Reform. 20

B. Contrary to Justice Breyer's Concerns in *Harris*, Defendants Have Not Been Harmed Under *Apprendi*. 27

III. Even Apart from the Sixth Amendment Issues, Treating the Nature of the Weapon Used in this Case as a Sentencing Factor Would Exceed *McMillan*'s Due Process Limits on Legislative Discretion To Establish Sentencing Factors. 30

IV. The Canon of Constitutional Avoidance Counsels in Favor of Respondent's Interpretation of the Statute. 33

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Almendarez-Torres v. United States, 523 U.S. 226 (1998) 31

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*

Blakely v. Washington, 542 U.S. 296 (2004) ..... *passim*

Castillo v. United States, 530 U.S. 120 (2000) 31

Cunningham v. California, 549 U.S. 270 (2007) 2, 5, 15

Duncan v. Louisiana, 391 U.S. 145 (1968) 5

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 (1988) 33

Gall v. United States, 552 U.S. 38 (2007) 15

Harris v. United States, 536 U.S. 545 (2002) ..... *passim*

Jones v. United States, 526 U.S. 227 (1999) 9, 10

Kimbrough v. United States, 552 U.S. 85 (2007) 15

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 2, 7, 8, 9, 16, 30, 32

Monge v. California, 524 U.S. 721 (1998) 30

Mullaney v. Wilbur, 421 U.S. 684 (1975) 8

Oregon v. Ice, 129 S. Ct. 711 (2009) 15, 33

Patterson v. New York, 432 U.S. 197 (1977) 8, 30, 33

Rita v. United States, 551 U.S. 338 (2007) 15

Shepard v. United States, 544 U.S. 13 (2005) 15

Spears v. United States, 129 S. Ct. 840 (2009) 15

United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006) 24, 29

United States v. Booker, 543 U.S. 230 (2005) ..... *passim*

United States v. Gaudin, 515 U.S. 506 (1995) 1, 6

United States v. Powell, 469 U.S. 57 (1984) 6

Washington v. Recuenco, 548 U.S. 212 (2006) 15

In re Winship, 397 U.S. 358 (1970) 2, 8

STATUTES

18 U.S.C. § 924(c) 4, 7, 12, 19, 33

OTHER AUTHORITIES

Letter from the Honorable Donetta W. Ambrose, Chief Judge, Western District of Pennsylvania, to Judith Sheon, Staff Director, U.S. Sentencing Comm'n (June 25, 2008), *available at* http://www.ussc.gov/AGENDAS/20090709/Ambrose_testimony.pdf 22

Rachel E. Barkow, Professor of Law and Faculty Director, Center on the Administration of Criminal Law, New York University School of Law, Statement Before the United States Sentencing Commission, Regional Hearing (July 10, 2009), *available at* http://www.ussc.gov/AGENDAS/20090709/Barkow_testimony.pdf 21

Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003) 6

Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341 (2006) 27

Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063 (2006) 28

Judge Paul Cassell, Statement on Behalf of the Judicial Conference of the United States Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (June 2007), *reprinted in* 19 FED. SENT. REP. 344 (2007) 24

Jonathan P. Caulkins et al., Drug Policy Research Center, RAND, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* (1997) 23, 25

The Honorable Denny Chin, United States District Judge, Southern District of New York, Statement Before the United States Sentencing Commission Public Hearing (July 9, 2009), *available at* http://www.ussc.gov/AGENDAS/20090709/Chin_testimony.pdf 22

The Honorable Robert J. Conrad, Jr., Chief District Judge, Western District of North Carolina, Statement Before the United States Sentencing Commission Public Hearing (Feb. 11, 2009), *available at* http://www.ussc.gov/AGENDAS/20090210/Judge%20Robert%20Conrad%20021109.pdf 22

THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1891) 5

The Honorable Nancy Gertner, United States District Judge, District of Massachusetts, Statement Before the United States Sentencing Commission Public Hearing (July 10, 2009), *available at* http://www.ussc.gov/AGENDAS/20090709/Gertner_ Testimony.pdf 22

Valerie P. Hans & Neil Vidmar, JUDGING THE JURY (1986) 6

Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993) 23

Ricardo H. Hinojosa, Statement Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security (June 26, 2007), *reprinted in* 19 FED. SENT. REP. 335 (2007) 24, 25

Associate Justice Anthony M. Kennedy, Speech at the American Bar Ass'n Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/ sp_08-09-03.html 26-27

National Association of Sentencing Commissions, THE SENTENCING GUIDELINE (Feb. 2009), *available at* http://www.ussc.gov/STATES/NASC_2009_02.pdf 21

Roscoe Pound, *Law in Books and Law in* Action, 44 AM. L. REV. 12 (1910) 5

J.J. Prescott, *Measuring the Consequences of Criminal Jury Trial Protections* (Jan. 2006) (unpublished manuscript), *available at* http://www-personal.umich.edu/~jjpresco/Prescott.Measuring_Jury_Trial_Protections_Jan_2006.pdf 28

Chief Justice William H. Rehnquist, Luncheon Address at the Inaugural Symposium on Crime and Punishment in the United States (June 18, 1993), *in* UNITED STATES SENTENCING COMMISSION, DRUGS AND VIOLENCE IN AMERICA: PROCEEDINGS OF THE INAUGURAL SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES (1993) 23

Stephen Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993) 23

Brief for the United States in *United States v. Booker*, 543 U.S. 220 (Nos. 04-104 and 04-105) 15-16

UNITED STATES SENTENCING COMMISSION ANNUAL REPORT SOURCEBOOK (2008) 28

UNITED STATES SENTENCING COMMISSION PRELIMINARY QUARTERLY DATA REPORT (2nd Quarter Release, Preliminary Fiscal Year 2009 Data) (2009) *available at* http://www.ussc.gov/sc_cases/USSC_2009_Quarter_Report_2nd.pdf 20

UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004) 25

UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) 23

Virginia Sentencing Commission, 2008 Annual Report (2008), *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4152008/$file/RD415.pdf 20-21

Robert Weisberg, Edwin E. Huddleson, Jr., Professor of Law and Director, Stanford Criminal Justice Center, Stanford University, Statement Before the United States Sentencing Commission, Regional Hearing (May 28, 2009), *available at* http://www.ussc.gov/AGENDAS/20090527/Weisberg_testimony%20.pdf 21-22

John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE SOC'Y 166 (1929) 5

Ronald F. Wright, Professor of Law and Associate Dean for Academic Affairs, Wake Forest University School of Law, Statement Before the United States Sentencing Commission, Regional Hearing (Feb. 11, 2009), *available at* http://www.ussc.gov/AGENDAS/20090210/Wright_statement.pdf 21

INTEREST OF *AMICUS CURIAE*[1]

The Center on the Administration of Criminal Law ("Center") is dedicated to defining good government and prosecution practices in criminal justice matters through academic research, litigation, and participation in the formulation of public policy. The Center's litigation practice aims to use the Center's empirical research and experience to assist courts in important criminal justice cases. As the Center's name suggests, it is devoted to improving the quality of the administration of criminal justice and advocating the adoption of best practices through its scholarly, litigation, and public policy components. The Center's focus on government practices in criminal cases and on the exercise of prosecutorial power and discretion, its research-based approach, and its diversity of work make it the first and only organization of its kind.

SUMMARY OF ARGUMENT

One of the cornerstones of American government is that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995). And the Court has long held that the Constitution protects a defendant "against conviction except upon proof beyond a reasonable doubt of every fact

---

[1] The parties have consented to the submission of this brief. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

In *United States v. Booker*, 543 U.S. 220 (2005), this Court affirmed that these basic principles required that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244; *see also Blakely v. Washington*, 542 U.S. 296, 304 (2004) ("When a judge inflicts punishment that the jury's verdict does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." (quotation marks omitted)). Because there is no constitutionally supportable reason for exempting those facts that require the application of a statutory mandatory minimum from this foundational rule, this Court should clarify that it is impermissible for judicial factfinding to set the limits of any legally mandated sentencing range.

As explained herein, the Court's prior decisions concerning mandatory minimums in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Harris v. United States*, 536 U.S. 545 (2002), do not compel a different result. Neither decision can survive the constitutional holdings in *Blakely*, *Booker*, and *Cunningham v. California*, 549 U.S. 270 (2007). Nor should they. Virtually every court and commentator to have considered the matter has concluded that a regime that mandates the imposition of statutory minimum prison terms based on judicial factfinding

under a civil standard of proof is neither principled nor wise. Preserving a loophole that allows circumvention of the jury right and the traditional criminal standard of proof to secure a mandatory minimum sentence incentivizes legislatures and prosecutors to rely heavily on mandatory minimums—a result that undermines the goals of proportionality and fairness that modern structured sentencing reforms are meant to achieve.

These concerns with proportionality and fairness are clearly implicated here. The government claims that it is entitled to have a judge find facts under a civil standard of proof triggering the application of a mandatory minimum that would more than triple Respondent O'Brien's and more than quadruple Respondent Burgess's sentence. This is contrary not only to Respondents' Sixth Amendment right to have a jury find any fact that, as a matter of law, is necessary to increase their sentences, but also to fundamental guarantees of Due Process. Congress may not convert an element of a crime into a sentencing factor simply for the purpose of streamlining the process of criminal convictions, which is what the government admits occurred here. As this Court has repeatedly held, it will not countenance legislative efforts to evade the requirements of the Fifth and Sixth Amendments. Thus, even if this Court is not prepared to declare a rule requiring that every fact, other than a prior conviction, that mandates a binding sentencing range must be found by the jury or admitted by the defendant, the government's interpretation of the

statute at issue here still fails under the Court's established Due Process principles.

At a minimum, because of the significant constitutional difficulties with the government's interpretation of 18 U.S.C. § 924(c), this Court should invoke the canon of constitutional avoidance to find that Congress did not intend to convert an element of a crime into a sentencing factor.

ARGUMENT

I. *Booker* Dictates that All Facts that, as a Matter of Law, Increase a Defendant's Sentencing Range Must Be Found by the Jury or Admitted by the Defendant.

In its landmark decision in *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the then-binding United States Sentencing Guidelines unconstitutionally abridged a defendant's Sixth Amendment right to trial by jury because the Guidelines regime denied defendants the right to have the jury find the facts that increased the binding range within which the judge was authorized to sentence. Relying on its prior decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court explained that while a "trial judge [may] exercise[] his discretion to select a specific sentence within a defined range," *Booker*, 543 U.S. at 233, any fact that, as a matter of law, was necessary to increase a defendant's sentence, even if below the statutory maximum, "must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244; *see also Apprendi*, 530 U.S. at

490; *Blakely*, 542 U.S. at 303-04; *Cunningham*, 549 U.S. at 274-75.

Booker's treatment of facts that set *binding* sentencing ranges as constitutionally different from facts that set *advisory* ranges, or facts that are otherwise considered by the judge at his or her discretion in imposing a sentence, vindicates the historically important role of the jury. This Court has stressed the need "to give intelligible content to the right of jury trial" and the Framers' effort to ensure that the jury could and would "function as circuitbreaker in the State's machinery of justice." *Blakely*, 542 U.S. at 305-06. The right to a jury trial guarantees a community check not only against the "corrupt or overzealous prosecutor" and "the compliant, biased, or eccentric judge," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), but also against the broad and sometimes unfair rules of even a well-meaning legislature.[2]

---

[2] *See, e.g.*, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 94 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1891) ("Let [a man] be considered as a criminal by the general government, yet only his fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him.") (quoting Theophilus Parsons in the Massachusetts Convention of 1788); John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE SOC'Y 166, 170 (1929) ("The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case."); Roscoe Pound, *Law in Books and Law in* Action, 44 AM. L. REV. 12, 18 (1910) (praising the jury's power to correct overbroad laws in the name of justice as "the great corrective of law in its actual administration");

The danger of legislative overreaching that the jury is meant to guard against is equally present with respect to criminal laws that trigger mandatory minimum sentences as with those laws that set mandatory maximums.[3] As a matter of constitutional logic, "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts," *Gaudin*, 515 U.S. at 513, applies just as strongly to facts that *require* a minimum sentence as it does to those facts that merely *authorize* a maximum sentence, *see Apprendi*, 530 U.S. at 563-64 (Breyer, J., dissenting). Indeed, for much of our Nation's history, facts that raised the required minimum also raised the authorized maximum, and courts treated those facts as offense elements without drawing any distinction based on the effect on the minimum or maximum. *See id.* at 522 (Thomas, J., concurring) (surveying cases).

Valerie P. Hans & Neil Vidmar, JUDGING THE JURY 155 (1986) ("Because lawmakers cannot anticipate every set of circumstances, it is up to the jury to adjust the general rule of law to the justice of the specific case."); *see also United States v. Powell*, 469 U.S. 57, 65 (1984) (explaining "the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch").

[3] *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48-84, 106-16 (2003) (describing the Framers' view of the jury's role in a system of separated powers and explaining that it is the *mandatory* nature of both legally binding guidelines and mandatory minimums that places them at odds with the constitutional function of the jury).

This treatment makes sense, of course, because just like an increase in an authorized maximum, an increased "mandatory minimum entitles the government to more than it would otherwise be entitled" in the absence of the law and consequently, "the change in the range available to the judge affects his choice of sentence." *Id.* (quotation marks omitted). That becomes clear from an examination of this very case, in which the mandatory minimums to which the government claims entitlement would more than triple O'Brien's § 924(c) sentence (from 102 months to 360 months) and more than quadruple Burgess's § 924(c) sentence (from 84 months to 360 months), without a jury ever passing judgment on the facts that trigger these increases and under a preponderance of the evidence standard. The Court's decision in *Booker* makes clear that the Constitution does not countenance such an end-run around the jury guarantee.

A. The Court's Decisions in *McMillan* and *Harris* Do Not Require a Different Result.

This is not the first case in which this Court has faced the question of whether a defendant's right to trial by jury attaches to facts that increase a binding minimum sentence. But it is the first case in which this Court has considered the question in light of its holdings in *Blakely*, *Booker*, and *Cunningham*. As explained below, the Court's prior decisions regarding the applicability of the jury right to the statutory minimum schemes at issue in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Harris v. United States*, 536 U.S. 545 (2002), must therefore be reexamined in light of the pronouncements and

principles set forth in *Blakely*, *Booker*, and *Cunningham*.

1. *McMillan* Did Not Address the Relationship Between Mandatory Minimums and the Right to Trial by Jury.

McMillan v. Pennsylvania, 477 U.S. 79 (1986), marked the Court's first encounter with what *Booker* later described as a "new trend in the legislative regulation of sentencing": legislative use of so-called sentencing facts that "not only authorized, or even mandated, heavier sentences than would otherwise have been imposed, but increased the range of sentences possible for the underlying crime." 543 U.S. at 236. *McMillan* involved Pennsylvania's creation of a mandatory minimum sentencing enhancement that supplemented its existing indeterminate sentencing regime. The Court analyzed Pennsylvania's legislative innovation in light of the rough Due Process calculus that it discerned from *In re Winship*, 397 U.S. 358 (1970), and its progeny, *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977), and "concluded that the Pennsylvania statute did not run afoul of [the Court's] previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of a criminal statute solely to avoid *Winship*'s strictures." *Apprendi*, 530 U.S. at 486 (citing *McMillan*, 477 U.S. at 86-88). *McMillan* explained that the Pennsylvania mandatory minimums "operate[d] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm."

McMillan, 477 U.S. at 88. Having determined that Pennsylvania's treatment of the visible possession of a firearm as a sentencing factor did not fall on the wrong side of *Winship*'s Due Process divide, the Court disposed of petitioners' jury trial claim in a scant paragraph, finding the claim "merit[ed] little discussion." *Id.* at 93.

The Court's later cases made clear that *McMillan* had not adequately addressed the jury question. In *Jones v. United States*, 526 U.S. 227, 244 (1999), this Court refused to treat the *Winship* Due Process analysis as defining the nature and extent of the jury trial inquiry. The Court explained that while the potential Due Process problem arose out of "*Mullaney*'s insistence that a State cannot manipulate its way out of *Winship,* and from *Patterson's* recognition of a limit on state authority to reallocate traditional burdens of proof," *Jones*, 526 U.S. at 243, the threat to the right to trial by jury was "evident from the practical implications of assuming Sixth Amendment indifference to treating a fact that sets the sentencing range as a sentencing factor, not an element," *id.*

Moreover, the *Jones* Court explained that "the history bearing on the Framers' understanding of the Sixth Amendment principle [did not] demonstrate[] an accepted tolerance for exclusively judicial factfinding to peg penalty limits." *Id.* at 244. That history revealed instead a common understanding that the right of trial by jury was of central importance to the preservation of liberty, *id.* at 246, and that the finding of facts was a "sacred" prerogative of the jury beyond any possible dispute,

id. at 247. After examining this history, the *Jones* Court concluded that "diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled." *Id.* at 248.

Apprendi v. New Jersey, 530 U.S. 466 (2000), confirmed what *Jones* had suggested: The constitutionality of a sentencing factor that "sets the sentencing range," *Jones*, 526 U.S. at 243, turns not merely on abstract notions of Due Process, but on the concrete protections of trial by jury, the "great bulwark of [our] civil and political liberties." *Apprendi*, 530 U.S. at 477 (quoting 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873)) (alteration in original). At our Nation's founding, the distinction *McMillan* drew between mandatory sentencing factors and elements of a crime was "unknown," *id.* at 478, as criminal laws for felonies generally set a "particular sentence for each offense," *id.* at 479. However, then as now, the jury right was not abridged by the exercise of judicial discretion "*within the range* prescribed by statute." *Id.* at 481. Analyzing the historic right to trial by jury, the Court in *Apprendi* adopted the constitutional rule proposed by Justice Stevens' concurrence in *Jones*: "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 490 (quotation marks omitted).

Although its decision appeared to conflict with *McMillan*, *see id.* at 533 (O'Connor, J., dissenting), the *Apprendi* Court did not expressly overrule it, instead preferring to "limit [*McMillan*'s] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict," and "reserv[ing] for another day the question whether *stare decisis* considerations preclude reconsideration of its narrower holding." 530 U.S. at 487 n.13.

Justice Thomas's concurrence, however, went further. After examining the common law cases in great detail, he observed that these cases often involved facts that triggered an entirely new sentencing range—at "both the top and bottom"—and noted that courts finding such facts to be elements "did not bother with any distinction between changes in the maximum and minimum." *Id.* at 522 (Thomas, J., concurring). Thus he concluded that it is "clear that the common law rule would cover the *McMillan* situation." *Id.* at 521.

2. As Five Justices in *Harris* Concluded, and as *Booker* Makes Clear, *Apprendi* Logically Applies to Facts that Trigger Mandatory Minimums.

Harris v. United States, 536 U.S. 545 (2002), presented the Court with the opportunity either to hold that *McMillan* was consistent with *Apprendi*, or to reject *McMillan* in favor of *Apprendi*. Four Members of the Court found *McMillan* logically consistent with *Apprendi* and opined that it should survive. Four Members thought the cases were

inconsistent and that *McMillan* should be overruled. The final Member of the Court, Justice Breyer, agreed with the four dissenting Justices that the logical import of *Apprendi* was that *McMillan* was no longer good law. But Justice Breyer voted not to overrule *McMillan* because he was concerned that an extension of *Apprendi*'s principles to mandatory minimum sentences would have adverse practical and legal consequences for the operation of the sentencing guidelines.

Harris involved 18 U.S.C. § 924(c)(1)(A)(ii), which, as relevant, imposed a higher minimum sentence for the possession of a firearm in furtherance of a drug trafficking crime or a crime of violence where the defendant was found by the court to have brandished the firearm. The sentencing court in *Harris* found by a preponderance of the evidence at sentencing that the defendant had brandished a weapon and therefore imposed the seven-year minimum sentence for brandishing, rather than the five-year minimum for possession. *Harris*, 536 U.S. at 551. In a plurality opinion written by Justice Kennedy, four Members of the Court concluded that *McMillan* was distinguishable from *Apprendi* and was entitled to deference under principles of *stare decisis*. The plurality explained that "[t]he factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury," while "[t]he finding in *McMillan* restrained the judge's power, limiting his or her choices within the authorized range." *Id.* at 567. Thus, central to the *Harris* plurality's effort to harmonize *McMillan* and

Apprendi was the conclusion that, so long as the sentence remained below the statutory maximum, facts that require an increased minimum sentence, as visible possession of a firearm did in *McMillan*, would not "alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 563 (quoting *Jones*, 526 U.S. at 253 (Scalia, J., concurring)).

In a dissenting opinion written by Justice Thomas, four Members of the Court found that *McMillan* could not be distinguished from *Apprendi* and should be overruled. The dissenters argued that, on the basis of the original understanding of the elements of a crime, any fact necessary for the prosecution's entitlement to a particular "kind, degree, or range of punishment" was an element of the crime that must be proved to a jury beyond a reasonable doubt. *Id.* at 575 (Thomas, J., dissenting) (quoting *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring)). Because, like visible possession of a weapon in *McMillan*, whether or not the defendant brandished a firearm in *Harris* altered the legally-prescribed range of penalties, the fact of such brandishing had to be found by a jury or admitted by the defendant. *Id.*

Justice Breyer agreed with the dissent that *Apprendi* could not be distinguished from *Harris* "in terms of logic." *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment); *see also Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting) ("[A]ll the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum apply *a*

fortiorari to any matter that would increase a statutory minimum."). Thus, a majority of the Court in *Harris* agreed that the principles announced in *Apprendi* required treating as offense elements those facts that triggered mandatory minimum sentences as a matter of law.

But in *Harris*, Justice Breyer was not yet ready to accept the extension of *Apprendi* to mandatory minimums because he "believe[d] that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal consequences." *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). Justice Breyer explained that he opposed applying *Apprendi* to mandatory minimums as a policy matter because he predicted that this would, in practice, transfer power from juries to prosecutors and would have the "seriously adverse" legal consequence of diminishing Congress's "constitutional authority to define crimes through the specification of elements, to shape criminal sentences through the specification of sentencing factors, and to limit judicial discretion in applying those factors in particular cases." *Id.* at 571-72 (citing *Apprendi*, 530 U.S. at 555 (Breyer, J. dissenting)).

While Justice Breyer could not "yet accept [*Apprendi*'s] rule," in *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment), a decision that came just two years after *Apprendi* was decided, it has now been a decade since the rule was announced. Over this decade, *Apprendi*'s rule has become firmly entrenched in the Court's jurisprudence and the Nation's criminal

justice systems. This Court has now applied or reiterated the rule at least ten times since the *Harris* decision. *See, e.g., Blakely*, 542 U.S. 296; *Booker*, 543 U.S. 220; *Shepard v. United States*, 544 U.S. 13 (2005); *Washington v. Recuenco*, 548 U.S. 212 (2006); *Cunningham*, 549 U.S. 270; *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Oregon v. Ice*, 129 S. Ct. 711 (2009); *Spears v. United States*, 129 S. Ct. 840 (2009). Indeed, *Apprendi* is now an established precedent that has been accepted even by those Members of the Court, like Justice Breyer, who believe it was wrongly decided. *See Oregon v. Ice*, 129 S. Ct. at 717 (opinion of the Court joined by Justice Breyer acknowledging the validity of *Apprendi* and the Court's obligation to honor the "'longstanding common-law practice' in which the rule is rooted" (quoting *Cunningham*, 549 U.S. at 281)). Thus, the opinion of five Justices in *Harris* that the logic of *Apprendi* dictates treating facts as elements of an offense if, as a matter of law, they mandate a particular minimum sentence is now binding.

If there were any doubt left on this score, *Booker* itself erases it. By applying *Apprendi* to the Sentencing Guidelines, even though the Guidelines do not exceed the relevant statutory maximum, the Court made clear that the constitutional underpinning of *Harris* was no longer valid. Indeed, the government conceded as much in *Booker*, warning that to apply *Blakely* to the Sentencing Guidelines would result in the overruling of *Harris* on its facts. Brief for the United States at 38 n.16,

United States v. Booker, 543 U.S. 220 (Nos. 04-104 and 04-105).

The plurality opinion in *Harris* and the majority opinion in *McMillan* both depend on a proposition squarely rejected by *Booker*—that only the statutory maximum has Sixth Amendment significance and a sentence can be increased by judicial findings as long as it remains under that maximum. This notion led *McMillan* to hold and the *Harris* plurality to agree that the mandatory minimum statute in *McMillan* was constitutional because it "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor." *McMillan*, 477 U.S. at 89-90; *Harris*, 536 U.S. at 559 (Kennedy, J., concurring). The *Harris* plurality argued that while mandatory minimums have a "practical effect" on the sentence, 536 U.S. at 566, mandatory minimums do not "alter the congressionally prescribed range of penalties to which a criminal defendant is exposed," *id.* at 563 (quoting *Jones*, 526 U.S. at 253 (Scalia, J., concurring)); *see also McMillan*, 477 U.S. at 88.

Booker, however, rejected the proposition that whether a fact must be found by a jury turns on whether the existence of that fact requires the sentencing court to impose a sentence within or above the statutory range. Rather, the *Booker* Court held the Sentencing Guidelines unconstitutional even though the sentence Booker himself received was below the statutory maximum for the offense and the increase in the binding Guidelines range was based on the court's finding of a fact—drug

quantity—traditionally considered by courts in setting punishment. *Booker*, 543 U.S. at 235. In doing so, *Booker* made clear that it is the *mandatory* effect of the factual finding that is decisive, not whether or not the ultimate sentence falls below a statutory maximum. Thus, the Court concluded: "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Id.* at 233. In other words, *Booker* adopted as a matter of constitutional law the historic distinction identified by Justice Thomas in his concurrence in *Apprendi* between "establishing what punishment is available by law" and "setting a specific punishment within the bounds that the law has prescribed." *Apprendi*, 530 U.S. at 519 (Thomas, J., concurring).

To be sure, there is language in *Booker* that can be (and has been) read to exclude judicial factfinding that increases the bottom of a binding sentencing range. *See Booker*, 543 U.S. at 244. But this reading ignores not only the logic of *Apprendi*, as five Justices in *Harris* concluded, but, more fundamentally, the principles that underlie the guarantee of trial by jury and that animated this Court's decisions in *Apprendi, Blakely, Booker,* and *Cunningham*. These principles emerged from "the ideals our constitutional tradition assimilated from the common law." *Id.* at 238 (citing *Jones*, 543 U.S. at 244-48). Chief among them was that the unanimous concurrence of ordinary citizens should stand between a potentially tyrannical government

and its entitlement to the criminal sanction. *See id.* at 237-39. That "common-law ideal of limited state power accomplished by strict division of authority between judge and jury" animates the jury provisions contained in Article III and the Sixth Amendment. *Blakely*, 542 U.S. at 313. "[T]he principles that animated the decision in *Apprendi* and the bases for the historical practice upon which *Apprendi* rested" make clear that "there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting).

In this case, these principles are clearly implicated. Prosecutors conceded that they could not prove to a jury beyond a reasonable doubt the fact that Respondents not only possessed a firearm in furtherance of a crime of violence, but that the firearm was a machinegun, one of the "most dangerous and threatening weapons available." Gov't Br. at 31. The judge, using a preponderance of the evidence standard, and constrained by appellate review, was, prosecutors thought, more likely to give them the factual finding and thirty-year sentence that they desired. Although the government argues that giving Respondents the right to demand that the government put its proof before a jury would serve "no great policy interest," *id.* at 33, *Booker* held otherwise. *See* 543 U.S. at 244 ("[T]he interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and this is now enshrined in the Sixth Amendment—has always outweighed the

interest in concluding trials swiftly."). Accordingly, the Court should recognize that the government's interpretation of § 924(c)(1)(B)(ii), along with *Harris* and *McMillan*, is inconsistent with *Booker*.

II. Applying *Apprendi* to Mandatory Minimums Is Consistent with the Sentencing Guidelines and Modern Sentencing Reform.

Justice Breyer resisted taking *Apprendi* to its logical conclusion in *Harris* because of his concern than doing so would undermine sentencing reform, particularly the Sentencing Guidelines and their effort to develop a more rational sentencing system. *Harris*, 536 U.S. at 572 (Breyer, J., concurring in part and concurring in the judgment) (citing *Apprendi*, 530 U.S. at 555 (Breyer, J., dissenting)). The Court later made clear in *Blakely* and *Booker* that the rule in *Apprendi* applies to mandatory guidelines, despite Justice Breyer's effort in *Harris* to keep them shielded from *Apprendi*'s reach. In any event, Justice Breyer's concern about the effect of *Apprendi* on sentencing reform was misplaced, as demonstrated by state and federal sentencing experiences. In fact, the pragmatic considerations that led Justice Breyer in his *Harris* concurrence to resist the extension of *Apprendi* to mandatory minimums all point in the opposite direction now, requiring the application of *Apprendi* to all facts necessary to set a binding sentencing range.

A. Taking *Apprendi* and *Booker* to Their Logical Conclusions and Treating Mandatory Minimum Sentencing Provisions as Offense Elements Furthers the Goals of Modern Sentencing Reform.

In *Harris*, Justice Breyer expressed concern that extending *Apprendi* to mandatory minimums would undermine modern sentencing reforms, particularly the Sentencing Guidelines, which seek to promote proportionality and uniformity in sentencing. *Harris*, 536 U.S. at 572 (Breyer, J., concurring in part and concurring in the judgment); *see also Apprendi*, 530 U.S. at 559 (Breyer, J., dissenting) (arguing that these basic goals of modern sentencing reform are also demanded by the Constitution as a matter of "basic 'fairness'"). But to treat mandatory minimums as an exception to the holding of *Apprendi*, *Blakely*, and *Booker* would, in fact, undermine these goals.

Although the United States Sentencing Guidelines have been advisory since the Court's decision in *Booker*, they continue to achieve strong compliance from the federal judiciary.[4] This is consistent with the experiences of those states that have purely advisory guidelines.[5] The prevailing

---

[4] *See* UNITED STATES SENTENCING COMMISSION PRELIMINARY QUARTERLY DATA REPORT (2nd Quarter Release, Preliminary Fiscal Year 2009 Data) tbl. 1 (2009) *available at* http://www.ussc.gov/sc_cases/USSC_2009_Quarter_Report_2nd.pdf (reporting that federal judges sentence outside the guideline range without a government motion in only 17% of cases).

[5] *See, e.g.*, Virginia Sentencing Commission, 2008 Annual Report 16 (2008), *available at* http://leg2.state.va.us/

view among sentencing experts and judges is that the post-*Booker* Guidelines regime improves upon the pre-Guidelines landscape because it avoids the pitfalls of the old system that often resulted in cases being treated alike though they were, in fact, dissimilar, while at the same time achieving broad consensus among judges on cases that are within the heartland of the Guidelines.[6] As one federal judge

---

dls/h&sdocs.nsf/By+Year/RD4152008/$file/RD415.pdf (reporting that Virginia's advisory guidelines have a compliance rate of 79.8%); National Association of Sentencing Commissions, THE SENTENCING GUIDELINE 7 (Feb. 2009), *available at* http://www.ussc.gov/STATES/NASC_2009_02.pdf (reporting that Maryland's advisory guidelines have a compliance rate of approximately 80%, based on data from fiscal year 2008); Ronald F. Wright, Professor of Law and Associate Dean for Academic Affairs, Wake Forest University School of Law, Statement Before the United States Sentencing Commission, Regional Hearing, at 6-7 (Feb. 11, 2009), *available at* http://www.ussc.gov/AGENDAS/20090210/Wright_statement.pdf (noting that compliance rates for Pennsylvania, North Carolina and Minnesota hovered around 75% despite dramatic differences in their legal force).

[6] Wright, *supra* note 5, at 9-11 (pointing out that compliance with advisory guidelines is strong and that the Commission best serves the goals of the Sentencing Reform Act by providing judges with data on what other judges are doing instead of seeking to mandate particular sentences); Rachel E. Barkow, Professor of Law and Faculty Director, Center on the Administration of Criminal Law, New York University School of Law, Statement Before the United States Sentencing Commission, Regional Hearing, at 6-7 (July 10, 2009), *available at* http://www.ussc.gov/AGENDAS/20090709/Barkow_testimony.pdf (citing compliance data and explaining that the current scheme better achieves proportionality); Robert Weisberg, Edwin E. Huddleson, Jr., Professor of Law and Director, Stanford Criminal Justice Center, Stanford University, Statement Before the United States Sentencing Commission,

summarized for the United States Sentencing Commission in contrasting the pre- and post-*Booker* eras: "[T]he Guidelines g[a]ve judges the means to sentence similar defendants similarly, but took away the opportunity to sentence different defendants differently. We now have that opportunity."[7]

Allowing a loophole from the *Apprendi-Blakely-Booker* line of cases for cases involving mandatory minimums would significantly undercut the goals that the Guidelines are meant to achieve. As countless experts, including the U.S. Sentencing Commission, have noted, mandatory minimums

---

Regional Hearing, at 2 (May 28, 2009) (stating that "[t]he current situation is a reasonably healthy, if accidental, equilibrium"), *available at* http://www.ussc.gov/AGENDAS/20090527/Weisberg_testimony%20.pdf.

[7] Letter from the Honorable Donetta W. Ambrose, Chief Judge, Western District of Pennsylvania, to Judith Sheon, Staff Director, U.S. Sentencing Comm'n, at 4 (June 25, 2008), *available at* http://www.ussc.gov/AGENDAS/20090709/Ambrose_testimony.pdf; *see also, e.g.*, The Honorable Denny Chin, United States District Judge, Southern District of New York, Statement Before the United States Sentencing Commission Public Hearing, at 3-4 (July 9, 2009), *available at* http://www.ussc.gov/AGENDAS/20090709/Chin_testimony.pdf; The Honorable Nancy Gertner, United States District Judge, District of Massachusetts, Statement Before the United States Sentencing Commission Public Hearing, at 1-4 (July 10, 2009), *available at* http://www.ussc.gov/AGENDAS/20090709/Gertner_Testimony.pdf; The Honorable Robert J. Conrad, Jr., Chief District Judge, Western District of North Carolina, Statement Before the United States Sentencing Commission Public Hearing, at 3 (Feb. 11, 2009), *available at* http://www.ussc.gov/AGENDAS/20090210/Judge%20Robert%20Conrad%20021109.pdf.

increase disparity and undermine proportionality.[8] By elevating a single variable over any other consideration, mandatory minimums "rarely reflect an effort to achieve sentencing proportionality." *Harris*, 536 U.S. at 571 (Breyer, J., concurring in part and concurring in the judgment). They are "fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines." *Id.* at 570.[9]

Because mandatory sentences focus on a single variable, they often also do a disservice to victims. Nearly 83% of the cases involving mandatory minimum sentences in the federal system involve drug offenses.[10] Judge Cassell recently testified on

---

[8] *See* UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991); *see also* Chief Justice William H. Rehnquist, Luncheon Address at the Inaugural Symposium on Crime and Punishment in the United States (June 18, 1993), *in* UNITED STATES SENTENCING COMMISSION, DRUGS AND VIOLENCE IN AMERICA: PROCEEDINGS OF THE INAUGURAL SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES 284-86 (1993); Stephen Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993); Jonathan P. Caulkins et al., Drug Policy Research Center, RAND, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* 12-25, 75-80 (1997).

[9] *See also* Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194 (1993).

[10] In the federal system, most mandatory minimum sentences apply to drug offenses. In fiscal year 2006, there were 33,636 counts of conviction carrying a mandatory minimum term of

behalf of the Judicial Conference of the United States before the House of Representatives and explained how applying these mandatory minimums sends the wrong message to victims of crime. He noted that "[w]hen the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their real pain and suffering counts for less than some abstract 'war on drugs.'"[11]

And although one of the main goals of the sentencing reform movement has been the elimination of racial disparities in sentencing, the existence of mandatory minimum sentencing has worked against that effort. Black offenders make up 32.9% of those convicted of a mandatory minimum

---

imprisonment, affecting 20,737 offenders—roughly 10 percent of the federal prison population. Most of these counts of conviction—82.9%—were for drug offenses. Firearms offenses made up another 11.4%. Ricardo H. Hinojosa, Statement Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, at 2 (June 26, 2007), *reprinted in* 19 FED. SENT. REP. 335 (2007).

[11] Judge Paul Cassell, Statement on Behalf of the Judicial Conference of the United States Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (June 2007), *reprinted in* 19 FED. SENT. REP. 344 (2007). One of Judge Cassell's cases demonstrates in vivid detail his point. In *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006), a first-time offender convicted of twice selling approximately $350 worth of marijuana while armed found himself with a sentence far greater than the sentences for individuals who rape, murder, kidnap, hijack an airplane, or detonate bombs in airplanes. *Id.* at 1244-46.

sentence, and Hispanic offenders make up 38.2%.[12] Black offenders comprise a greater percentage of offenders convicted of a statute carrying a mandatory minimum penalty than their already high percentage (23.8%) of the overall offender population.[13] In addition, excluding immigration offenses, both Hispanic and black offenders comprise a greater percentage of non-immigration offenders convicted of a statute carrying a mandatory minimum penalty than their percentage in the overall fiscal year 2006 offender population.[14] Indeed, the U.S. Sentencing Commission analyzed the effects of mandatory sentencing guidelines and mandatory minimum statutes and concluded that together they "have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."[15] On top of all these other shortcomings, mandatory minimum sentences are less effective than discretionary sentencing and drug treatment in reducing drug-related crime.[16]

If the Court were to refuse to accept the rule of law in the *Apprendi-Blakely-Booker* line of cases as it applies to mandatory minimum sentences, it would create a strong and perverse incentive for legislatures to place greater reliance on mandatory

---

[12] Hinojosa, *supra* note 10, 19 FED. SENT. REP. at 336 & tbl. 1.

[13] *Id.* at 336.

[14] *Id.*

[15] UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 135 (2004).

[16] *See generally* Caulkins, et al., *supra* note 8.

minimums, even though they undermine the goals of modern sentencing reform. *See Apprendi*, 530 U.S. at 564 (Breyer, J., dissenting) ("[B]y leaving mandatory minimum sentences untouched, the majority's rule simply encourages any legislature interested in asserting control over the sentencing process to do so by creating those minimums."); *id.* (noting that an increase in mandatory minimums "would mean significantly less procedural fairness, not more"). After *Booker*, *Blakely*, and *Cunningham*, legislatures can no longer dictate sentencing increases as a matter of law through mandatory sentencing guidelines based merely on judicial factfinding and using a civil standard of proof. If the Court allows a loophole for mandatory minimum sentencing provisions, however, legislatures can simply bypass the jury's constitutional role to achieve the same result.

There is a strong incentive for the Executive Branch to urge Congress to take such an approach because prosecutorial power to control sentencing increases under mandatory minimum regimes. As Justice Breyer has explained, mandatory minimum sentences "transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate." *Harris*, 536 U.S. at 571 (Breyer, J., concurring in part and concurring in the judgment); *see also Blakely*, 542 U.S. at 331 (Breyer, J., dissenting); Associate Justice Anthony M. Kennedy, Speech at the American Bar Ass'n Annual Meeting (Aug. 9, 2003), *available at*

http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html. Indeed, the Department of Justice has already recognized the value of a mandatory minimum loophole. After *Booker* was decided, the Justice Department considered a "fix" to the Sentencing Guidelines that would have turned the bottom of every Guidelines' range into a mandatory minimum, while leaving the Guidelines maximums advisory.[17]

This would have been no "fix" at all. As virtually every expert to have considered the issue has concluded, mandatory minimums are anathema to the goals of the sentencing reform movement. Thus, to exempt mandatory minimums from the logical reach of *Apprendi* and *Booker* on policy grounds would set back all the fundamental goals of sentencing reform, not advance them.

B. Contrary to Justice Breyer's Concerns in *Harris*, Defendants Have Not Been Harmed Under *Apprendi*.

In addition to the concern with sentencing reform in general, Justice Breyer also expressed in *Harris* his concern that defendants would ultimately suffer under *Apprendi*. 536 U.S. at 571 (Breyer, J., concurring in part, concurring in the judgment). This worry prompted Justice Breyer to conclude that *Apprendi* should be limited as much as possible, regardless of whether the logic of its holding would otherwise apply.

---

[17] *See* Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 356-59 (2006).

But contrary to Justice Breyer's predictions, empirical analysis shows that *Apprendi*'s recognition of "jury trial rights substantially benefits defendants" by lowering sentences.[18] And this is true whether one looks at cases that go to trial or at cases where the defendant pleads guilty.[19] This is what organizations such as the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders expected when they urged the Court in their *amici* filings in *Apprendi*, *Harris*, *Blakely*, and *Booker* to respect the jury guarantee and require any fact that mandates a particular sentence or sentencing range to be found by a jury beyond a reasonable doubt. These groups, with their experience in the trenches of criminal

---

[18] *See, e.g.*, J.J. Prescott, *Measuring the Consequences of Criminal Jury Trial Protections* 3, 24-27, and 53, tbl. 2 (Jan. 2006) (unpublished manuscript), *available at* http://www-personal.umich.edu/~jjpresco/Prescott.Measuring_Jury_Trial_Protections_Jan_2006.pdf (conducting an empirical review of sentences of comparable groups pre- and post-*Apprendi* and finding that *Apprendi*'s recognition of a defendant's jury trial right benefits defendants by reducing the average sentence in all criminal history categories, with some offenders benefitting by more than 5%).

[19] *Id.* at 66-67, tbls. 1, 2. The empirical evidence post-*Booker* is to the same effect. *See* UNITED STATES SENTENCING COMMISSION ANNUAL REPORT SOURCEBOOK, tbl. 31A (2008) (showing post-*Booker* increase in downward departures). Prosecutors agree. *See* Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1090 (2006) (observing that "on balance, *Booker* clearly takes some negotiating leverage away from the prosecution" in bargaining over the defendant's potential cooperation).

justice, have every incentive to assess accurately what will best protect defendants' rights. And these groups know all too well that defendants suffer greatly when mandatory minimums apply without the check of a jury. In many instances, juries consider the sentences required by mandatory minimums to be overly harsh and would impose substantially lower sentences if they had any say in the matter. *See, e.g., United States v. Angelos*, 345 F. Supp. 2d 1227, 1242 (D. Utah 2004) (in case where § 924(c) resulted in 61.5-year sentence due to the imposition of mandatory minimums, "the jurors recommended a mean sentence of about 18 years and a median sentence of 15 years," and "[n]ot one of the jurors recommended a sentence closely approaching" the mandatory minimum), *aff'd*, 433 F.3d 738 (10th Cir. 2006).

It has been true time and again, as it was in this case, that "as a practical matter, a legislated mandatory 'minimum' is far more important to an actual defendant" than the statutory maximum. *Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting). Common law cases recognized as much, treating these mandatory minimums as offense elements to be decided by the jury. *See id.* at 522 (Thomas, J., concurring). Thus, exempting increases in mandatory minimum sentences from the rule in *Apprendi* is neither principled nor wise. Permanently preserving this exemption even in the wake of *Blakely*, *Booker*, and *Cunningham* creates a perverse incentive for reliance on sentencing schemes that are less rational, less consistent, and less transparent, without any corresponding legal or

policy benefit. As a result, because the conditions that led Justice Breyer to resist the logical application of *Apprendi* counsel the opposite result in light of *Booker* and the empirical evidence, the Court should clarify that *Booker* effectively overruled *Harris* and that the holding of *Booker* applies to mandatory minimums as well.

III. Even Apart from the Sixth Amendment Issues, Treating the Nature of the Weapon Used in this Case as a Sentencing Factor Would Exceed *McMillan*'s Due Process Limits on Legislative Discretion To Establish Sentencing Factors.

Even apart from *Apprendi* and *Booker*, this Court has long recognized that the Constitution places limits on a legislature's power to define the elements of criminal offenses. *See Patterson*, 432 U.S. at 210; *McMillan*, 477 U.S. at 85; *Monge v. California*, 524 U.S. 721, 724 (1998); *Apprendi*, 530 U.S. at 552-53 (O'Connor, J., dissenting); *Harris*, 536 U.S. at 550; *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting); *Booker*, 543 U.S. at 330-31 (Breyer, J., dissenting in part). These Due Process limits derive from the principle that legislatures may not be permitted to "evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor." *Harris*, 536 U.S. at 550.

Here, even if the Court declines to recognize as a *per se* rule that every fact, other than a prior conviction, that mandates a binding sentencing range as a matter of law must be found by the jury or admitted by the defendant, the legislative choice to treat as a sentencing factor a fact that increases a

binding minimum sentence is still subject to constitutional scrutiny under the Due Process test adopted by *McMillan*, interpreted by *Almendarez-Torres v. United States*, 523 U.S. 226, 239-47 (1998), and reaffirmed as it applies to mandatory minimums by *Harris*, 536 U.S. at 568. Applying that test here, if Congress did intend to convert a traditional element of an established crime into a sentencing factor triggering at least a twenty-year increase in the mandatory minimum sentence, and if it did so for the purpose of avoiding the inconvenience and unpredictability of jury factfinding, then it clearly overstepped its constitutional authority.

The government has argued that this is exactly what happened. Gov't Br. at 32-33. According to the government, Congress thought that keeping the question of firearm-type from the jury would "simplif[y] and streamline[] guilt-stage proceedings," *id.* at 33, even though the government admits, as it must, that, "such evidence is usually clear-cut and can be grasped by a jury." *Id.* (citing *Castillo v. United States*, 530 U.S. 120, 127 (2000)).[20] Moreover, in the government's view, Congress converted firearm-type from an element into a sentencing factor because "judicial fact-finding and

---

[20] As Justice Breyer explained for the Court in *Castillo*, "to ask a jury, rather than a judge, to decide whether a defendant used or carried a machinegun would rarely complicate a trial or risk unfairness" because the type of weapon allegedly used or carried will normally be part of the government's case and the "evidence is unlikely to enable a defendant to respond *both* (1) 'I did not use or carry *any* firearm,' and (2) 'even if I did, it was a pistol, not a machinegun.'" *Castillo v. United States*, 530 U.S. 120, 127-28 (2000).

appellate review ensure consistent application of the firearm-type enhancement," which is, the government tells us, "no small concern where such an important crime-control interest is at stake." *Id.* These benefits, though "modest," are entirely justified, the government opines, since "no great policy interest would be served by treating firearm type as an offense element because a jury determination is unlikely to improve the accuracy of fact-finding on such an issue." *Id.*

It is difficult to imagine a clearer admission of a legislative purpose to "evade the requirements of the Fifth and Sixth Amendments." *Harris*, 536 U.S. at 568. Congress, the government argues, decided that its interest in controlling the possession of certain types of weapons was so important that whether a defendant was guilty of possessing one of these weapons, as opposed to a less dangerous firearm, should be decided by a judge by a preponderance of the evidence, and subject to government appeal, rather than by a jury beyond a reasonable doubt, and in the case of an acquittal, subject to no further judicial review. This naked—and admitted—purpose to evade the constitutional protections that attach to offense elements, stands in sharp contrast to the legislative purposes animating the statutory provisions at issue in *Harris*, *McMillan* and *Almendarez-Torres*.[21]

---

[21] In *Harris* and *McMillan*, the legislative purpose was to specify the weight that judges should give to a fact that they had previously used to inform their discretion. *Harris*, 536 U.S. at 568; *McMillan*, 477 U.S. at 89-90. In *Almendarez-Torres*, Congress merely provided that the government need not prove

Thus, to the extent that § 924(c)(1)(B)(ii) is interpreted as the government wishes to set forth sentencing factors rather than elements, it plainly violates the Due Process test applied in *McMillan*, *Almendarez-Torres* and *Harris*.

IV. The Canon of Constitutional Avoidance Counsels in Favor of Respondent's Interpretation of the Statute.

At the very least, the Court should invoke the canon of constitutional avoidance to construe the machinegun provision as an offense element in order to avoid the grave constitutional difficulties, detailed above, that would follow if it were deemed a sentencing factor. The Court has repeatedly stated that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This approach "reflects the prudential concern that constitutional issues not be needlessly confronted," while also recognizing that Congress does not typically "intend[] to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.* Given the severity of the potential Sixth Amendment and Due Process

---

that a defendant previously convicted of a crime, was in fact convicted of that crime. Similarly, in *Patterson*, 432 U.S. at 207, and *Ice*, 129 S. Ct. at 719, this Court emphasized that the States should be given substantial leeway in determining the elements of criminal offenses when their purpose and effect is to "temper the harshness of ... historical practice." *Ice*, 129 S. Ct. at 718.

problems, the canon of constitutional avoidance is particularly probative here.

CONCLUSION

For the reasons stated above, *amicus* urges this Court to affirm the decision of the Court of Appeals for the First Circuit.

Respectfully submitted,

ANTHONY S. BARKOW
DAVID B. EDWARDS
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
110 West Third St., Suite 214
New York, NY 10012
(212) 998-6612

DOUGLAS A. BERMAN
THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW
55 West 12th Avenue
Columbus, OH 43210
(614) 688-8690

SAMUEL L. FEDER*
JESSICA RING AMUNSON
NICHOLAS O. STEPHANOPOULOS
CHRISTOPHER J. DEAL
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
sfeder@jenner.com
(202) 639-6000

* Counsel of Record

Attorneys for *Amicus Curiae*

Dated: January 21, 2010

AMICUS CURIAE BRIEF

No. 08-1569

B688

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN O'BRIEN and ARTHUR BURGESS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICI CURIAE BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS & THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENTS

MARY PRICE
Vice President & General Counsel
Families Against Mandatory Minimums
1612 K Street, N.W., Suite 700
Washington, D.C. 20006
(202) 822-6700

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

SAMUEL J. BUFFONE
Counsel of Record
AARON M. KATZ
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW
Washington, D.C. 20006
(202) 508-4600

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES....ii
INTEREST OF *AMICI*....iv
SUMMARY OF ARGUMENT....1
ARGUMENT....4

A. Any Sentence Imposed Must Comply With *Apprendi*....5

B. *Booker* Reasonableness Review Contains a Substantive Component....5

C. A Sentence Below the Default Statutory Maximum Is Nevertheless Substantively Unreasonable If Greater Than Necessary to Serve the Purposes of Sentencing....7

D. Under *Apprendi*, If a Sentence Would Be Substantively Unreasonable Absent a Fact Neither Found by the Jury Nor Admitted by the Defendant, Then That Sentence Violates the Sixth Amendment....9

E. The Disputed "Machinegun" Fact That Triggers Section 924(c)(1)(B)(ii)'s Statutory Minimum Must Be Treated as an Element in Respondents' Case....13

CONCLUSION....15

TABLE OF AUTHORITIES

Cases

Apprendi v. *New Jersey*, 530 U.S. 466 (2000).....*passim*

Blakely v. *Washington*, 542 U.S. 296 (2004)...*passim*

Cunningham v. *California*, 549 U.S. 270 (2007).....11

Gall v. *United States*, 552 U.S. 38 (2007).....*passim*

Harris v. *United States*, 536 U.S. 545 (2002).....12

Irizarry v. *United States*, — U.S. —, 128 S. Ct. 2198 (2008).....11

Kimbrough v. *United States*, 552 U.S. 85 (2007).....*passim*

Rita v. *United States*, 551 U.S. 338 (2007).....*passim*

United States v. *Booker*, 543 U.S. 220 (2005)..... *passim*

United States v. *Ofray-Campos*, 534 F.3d 1 (1st Cir. 2008).....8

United States v. *Olhovsky*, 562 F.3d 530 (3d Cir. 2009).....8

United States v. *Ortega-Rogel*, 281 Fed. Appx. 471 (6th Cir. 2008).....8

United States v. *Sexton*, 512 F.3d 326 (6th Cir. 2008).....12

United States v. *Almendarez-Torres*, 532 U.S. 224 (1998).....12

United States v. *Stall*, 581 F.3d 276 (6th Cir. 2009).....6

United States v. *Stewart*, No. 06-5015, 2009 U.S. App. LEXIS 28595 (2d Cir. November 17, 2009).....6

United States v. *Tomko*, 562 F.3d 558 (3d Cir. 2009).....6

Statutes

18 U.S.C. § 921.....*passim*

18 U.S.C. § 1344.....8

18 U.S.C. § 3553.....*passim*

26 U.S.C. § 5845.....1

Federal Sentencing Guidelines

U.S.S.G. § 2K2.4 13

INTEREST OF *AMICI*

Families Against Mandatory Minimums ("FAMM") is a non-profit, non-partisan, educational association that conducts research and engages in advocacy regarding mandatory minimum sentencing laws. Founded in 1991, FAMM has over 24,500 members. Many of FAMM's members are either serving mandatory minimum sentences or are family members of such prisoners. In addition to advocating for change through the legislative process, FAMM participates in precedent-setting legal cases, like this one, that raise important statutory and constitutional issues with respect to mandatory minimum sentencing laws. FAMM's interest lies in ensuring that courts construe and apply mandatory minimum laws in a manner consistent with statutory and constitutional principles.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of state and federal

---

* Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. The Respondents have filed blanket waivers of consent to the filing of all *amicus* briefs. The Petitioner has consented to the filing of this *amici* brief, and such consent is being lodged herewith.

sentencing laws to ensure that findings that affect the length of criminal sentences are made according to statutorily and constitutionally required procedures.

SUMMARY OF ARGUMENT

This brief discusses why 18 U.S.C. § 924(c)(1)(B)(ii), as the Government construes it, cannot be constitutionally applied to Respondents O'Brien and Burgess. According to the Government, the statute mandates that a 30-year minimum sentence be imposed on Respondents if the district court finds by a preponderance of the evidence that the firearm that was brandished by a co-defendant during their robbery of an armored car was a "machinegun," as defined in 18 U.S.C. § 921(a)(23) and 26 U.S.C. § 5845(b). However, without such a judicial finding, a 30-year sentence for either Respondent would be substantively unreasonable under the Sentencing Reform Act. Under this Court's Sixth Amendment jurisprudence, lacking either a jury finding or admission of that fact, the district court cannot constitutionally impose the Government's suggested 30-year sentences. In other words, the "machinegun" fact must be treated as an element.

In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court excised the unconstitutional parts of the Sentencing Reform Act, leaving in place what is now the governing structure for federal sentencing: Under *Booker*, the absolute maximum sentence that a district court may lawfully impose is a sentence whose length could be upheld on appeal as "substantively reasonable." By reference to the "overarching" substantive standard Congress has established in the Sentencing Reform Act, a "reasonable" sentence means one that a court could fairly find to be "not greater than necessary" to further the purposes of criminal sentencing. *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007)

(explaining 18 U.S.C. § 3553(a)). The *Apprendi* rule is equally familiar: Under the Sixth Amendment, the sentence that a court imposes on a defendant must not exceed the maximum sentence that is legally authorized based on those facts either admitted by the defendant or found by a jury beyond a reasonable doubt.[1] *See Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (explaining and applying *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)).

The Government's opening brief does not discuss the relationship between *Booker*'s substantive reasonableness standard and the *Apprendi* rule, and its certiorari stage briefs seem implicitly to suggest that none exists. Without seeking to anticipate how (or whether) the Government might try to defend the constitutionality of invoking the "machinegun" provision (as a sentencing factor) to impose a 30-year sentence on Respondents, *Amici* urge this Court to clarify the following two points of federal sentencing law: (1) When a defendant's sentence would not survive appellate review for substantive reasonableness absent the existence of a particular fact, the Sixth Amendment requires that fact to be treated as an element and thus either found by the

---

[1] This brief recognizes that *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)—although, in the view of *Amici*, constitutionally unsound—has not been overruled. For ease of reading, this brief includes prior convictions as among those facts that has been found by a jury beyond a reasonable doubt and thus may constitutionally be used to support the legal validity of a sentence.

jury or admitted by the defendant.[2] (2) If a statute's mandatory minimum sentence would be substantively unreasonable absent a judge's finding of the disputed mandatory minimum-triggering fact, then that statute cannot constitutionally be applied to the defendant; in that event, the district court must disregard the statutory minimum and impose a sentence that is substantively reasonable—that is, "sufficient but not greater than necessary," 18 U.S.C. § 3553(a)—based on the facts found by the jury or admitted by the defendant.

---

[2] *Amici* note here, but do not further discuss, that the *Apprendi* rule also has a Fifth Amendment component: the sentence-enhancing fact must also be alleged in the indictment or other charging instrument.

ARGUMENT

In and since *Booker*, this Court has made clear several principles of federal sentencing law. First, as held in *Apprendi*, the Sixth Amendment limits the authority of a judge to enhance a sentence based on facts neither admitted by the defendant nor found by a jury beyond a reasonable doubt. Second, even if the district court follows all of the decision-making steps that the Sentencing Reform Act and Rules of Criminal Procedure procedurally require, the sentence it ultimately imposes must still be *substantively* reasonable as defined by the Sentencing Reform Act. Third, just as a sentence can be substantively unreasonable because it is too lenient (that is, insufficient to achieve the purposes of sentencing), it can also be substantively unreasonable because it is too *harsh* (that is, greater than necessary to achieve those ends).

Collectively, these principles compel the following conclusions: (1) If a given sentence would be found substantively *un*reasonable solely on the *Apprendi*-compliant facts (*i.e.*, those facts either found by a jury or admitted by the defendant), then that sentence cannot constitutionally be imposed, even if it would be substantively reasonable were the judicially found facts considered as well. (2) If a statutory mandatory minimum triggered by a judicially found sentencing factor would compel the district court to impose a sentence that would be substantively unreasonable based on the *Apprendi*-compliant facts, then that statutory minimum cannot be constitutionally applied to the defendant.

A. Any Sentence Imposed Must Comply With *Apprendi*.

Under *Apprendi*, the maximum sentence a defendant constitutionally may receive is "the maximum sentence a judge may [lawfully] impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Booker*, 543 U.S. at 232 (Stevens, J.) (quoting *Blakely*, 542 U.S. at 303; internal quotations and italics removed). *Apprendi* is settled law, and any sentence imposed on Respondents must comply with *Apprendi*.

B. *Booker* Reasonableness Review Contains a Substantive Component.

The *Booker* remedial opinion "plainly contemplated that reasonableness review would contain a substantive component." *Rita* v. *United States*, 551 U.S. 338, 365 (2007) (Stevens, J., concurring). Subsequently, this Court has explicitly held that even if "the district court's sentencing decision is procedurally sound, the appellate court should . . . consider the substantive reasonableness of the sentence imposed under an abuse of discretion standard." *Gall* v. *United States*, 552 U.S. 38, 51 (2007); *see also id.* at 60 (Scalia, J., concurring) (giving "*stare decisis* effect" to the inclusion of a substantive component in reasonableness review).

The Government itself has plainly accepted that reasonableness review includes a substantive component: Both before and subsequent to this Court's decision in *Gall*, the Government has frequently challenged as substantively unreasonable sentences that it perceives as too lenient. *See, e.g.*, *United States* v. *Stewart*, No. 06-5015, 2009 U.S.

App. LEXIS 28595 (2d Cir. November 17, 2009) (challenging as substantively unreasonable a term of 24 months' imprisonment that was twice the applicable Guidelines' range prior to the addition of a judicially-found "terrorism enhancement"); *United States* v. *Stall*, 581 F.3d 276 (6th Cir. 2009) (challenging as substantively unreasonable sentence of 1 day's imprisonment and 10 years' supervised release for first time offender who pled to two counts of possession of child pornography); *United States* v. *Tomko*, 562 F.3d 558 (3d Cir. 2009) (en banc) (challenging as substantively unreasonable a sentence of probation with a year's home confinement, community service, and full restitution plus a maximum fine in a $229,000 tax evasion case).

This Court has not yet provided a more precise definition of what it means for a sentence to be substantively unreasonable. However, the logical implication of *Kimbrough*, 552 U.S. at 101, is that substantive reasonableness is defined by the concept —firmly grounded in American penal philosophy— that operates as the "overarching instruction," *id.* at 111, of the Sentencing Reform Act, 18 U.S.C. § 3553(a): the principle of parsimony. This Court should clarify that a defendant's sentence is substantively unreasonable if a reasonable jurist would necessarily find it either insufficient or "greater than necessary," *id.*, to further the goals of criminal punishment set forth in Section 3553(a)(2).[3]

---

[3] That is not to say that appellate review of a sentence the Government asserts is too lenient is identical to review of a sentence a defendant asserts is excessive. Given Section 3553(a)'s parsimonious

(continued . . .)

C. A Sentence Below the Default Statutory Maximum Is Nevertheless Substantively Unreasonable If Greater Than Necessary to Serve the Purposes of Sentencing.

Just as a sentence may be unreasonable because it is too lenient (that is, not "sufficient"), a sentence may also be unreasonable because it is too severe (that is, "greater than necessary"). *See Gall*, 552 U.S. at 46 (stating that, for its sentence to survive a defendant's reasonableness challenge, a district court "must explain [its] conclusion that . . . an unusually harsh sentence is appropriate . . . with sufficient justifications"); *Rita*, 551 U.S. at 373 n.2 (Scalia, J., concurring) (stating that substantive "reasonableness review should not function as a one-way ratchet").

That reasonableness review cannot be a one-way street, allowing the Government to challenge sentences it views as too lenient yet insulating from all substantive review sentences challenged as too harsh, has never been seriously questioned by this Court. The courts of appeals have agreed, vacating as excessive sentences that nonetheless did not exceed the "default statutory maximum."[4] *See, e.g.*,

---

(. . . continued)

preference for leniency (that is, a sentence that is merely "sufficient" without being "greater than *necessary*"), it follows that appellate review of sentences alleged to be too short must be more deferential than review of sentences challenged as too long.

[4] By "default statutory maximum," this brief refers to the absolute maximum punishment that the congressional statute prescribes for the crime of conviction. For example, the "default statutory

(continued . . .)

United States v. *Olhovsky*, 562 F.3d 530, 547 (3d Cir. 2009) (vacating as excessive and thus substantively unreasonable a below-Guidelines sentence of six years' imprisonment for possession of child pornography that failed to account for defendant's youth and psychological infirmities); *United States* v. *Ofray-Campos*, 534 F.3d 1, 42-44 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 588 (2008) (vacating as excessive and thus substantively unreasonable 480-month sentence for participation in a multi-drug conspiracy); *United States* v. *Ortega-Rogel*, 281 Fed. Appx. 471 (6th Cir. 2008) (vacating as excessive and thus substantively unreasonable 24-month term for possession of false identification documents).

Because sentences not exceeding the applicable default statutory maximum can still be unlawfully excessive under *Booker*, the harshest substantively reasonable sentence functions as a "statutory maximum" within the meaning of the *Apprendi* rule. It necessarily follows that the Sixth Amendment prohibits a court from imposing on a defendant a sentence whose substantive reasonableness depends upon the presence of a fact neither found by the jury nor admitted by the defendant. In this case, the status of the firearm as a "machinegun" would be such a fact.

(. . . continued)

maximum" for federal bank fraud is 30 years. *See* 18 U.S.C. § 1344 (providing that a defendant shall not be imprisoned for "more than 30 years").

D. Under *Apprendi*, If a Sentence Would Be Substantively Unreasonable Absent a Fact Neither Found by the Jury Nor Admitted by the Defendant, Then That Sentence Violates the Sixth Amendment.

In *Gall*, this Court held that although reasonableness review is not susceptible to a mathematical formula, "a major departure [from the applicable Guidelines' range ordinarily] should be supported by a more significant justification than a minor one." 552 U.S. at 50. This expectation, where it applies, follows from the respect that is due the Sentencing Commission's expert work when it fulfills its "characteristic institutional role." *Kimbrough*, 552 U.S. at 110.[5]

At the certiorari stage, the Government argued that had the district court found the disputed

---

[5] It also follows from *Rita*'s holding that the courts of appeals may (but are not required to) apply an appellate presumption of reasonableness to sentences within the applicable Guidelines' range. *See Rita*, 551 U.S. at 340. In such cases, it is not the *range* that receives the presumption of reasonableness—otherwise the district courts would be authorized to indulge such a presumption, which they are not—but rather the *sentence*, because such cases are those in which the district judge's independent assessment of the sentence that is "sufficient, but not greater than necessary," coincides with the range the Commission has suggested for the applicable "category of cases." Where two different experts—district judge and Commission—find themselves in agreement after looking at the matter from different perspectives, then the appellate court may presume the result to be reasonable.

"machinegun" fact, a 30-year sentence for Respondents would not have been subject to a substantive reasonableness challenge. But this is not an answer to the *Apprendi* problem that Respondents have identified, which is that a 30-year sentence would be substantively *un*reasonable (and hence unlawful) *without* the judicially found "machinegun" fact. This Court's "precedents make clear" that the maximum sentence that may be imposed on a defendant "is the maximum sentence a judge may impose" solely on the facts either found by the jury or admitted by the defendant. *Blakely*, 542 U.S. at 303-04. "When a judge inflicts punishment that" those facts alone "do[ ] not allow," then the "judge exceeds his [constitutional] authority." *Id.* at 304. Whether the applicable maximum sentence for *Apprendi* purposes is determined by statute (as in *Apprendi* and *Blakely*), administrative guideline (as under the Federal Sentencing Guidelines, prior to *Booker*), or judicial decision (as with substantive reasonableness review), the Sixth Amendment applies all the same.

Under *Apprendi*, if a sentence would not be legally authorized based solely on those facts either found by a jury beyond a reasonable doubt or admitted by the defendant, then that sentence cannot be constitutionally imposed. This Court has plainly held that appellate review for reasonableness has a substantive component, and this necessarily establishes that the applicable *Apprendi* "maximum" for any particular defendant is the maximum sentence that would be upheld on appeal as substantively reasonable based solely on those facts found by the jury beyond a reasonable doubt or admitted by the defendant. *See Blakely*, 542 U.S. at

303 (defining "statutory maximum" for *Apprendi* purposes). Thus, if the defendant's sentence would be held substantively *un*reasonable absent the judicially found facts, then the defendant's sentence violates the Sixth Amendment and cannot stand.

Five Justices of this Court have identified this convergence point between *Apprendi* and substantive reasonableness review. Justice Alito has explained that "reasonableness review imposes a very real constraint on a judge's ability to sentence across the full statutory range without finding some aggravating fact. . . . [T]here inevitably will be *some* sentences that, absent any judge-found aggravating fact, will be unreasonable." *Cunningham* v. *California*, 549 U.S. 270, 309 & n. 11 (2007) (Alito, J., dissenting, joined by Kennedy & Breyer, JJ.). Justice Scalia has explained that *Apprendi* entitles a defendant to challenge his sentence on the ground that it "would not [be] upheld as reasonable on the facts encompassed by the jury verdict or guilty plea." *Rita*, 551 U.S. at 375 (Scalia, J., dissenting). And Justice Thomas has indicated that he agrees with Justice Scalia's analysis. *See Irizarry* v. *United States*, — U.S. —, 128 S. Ct. 2198, 2204 (2008) (Thomas, J., concurring). As Justice Scalia has recently stated, "The door . . . remains open for a defendant to demonstrate that his sentence . . . would not [be] upheld [as substantively reasonable] but for the existence of a fact found by the sentencing judge[.]" *Gall*, 552 U.S. at 60 (Scalia, J., concurring). The Government treats that door not merely as closed, but as non-existent. The majority of the Justices of this Court has suggested otherwise.

Though *Amici* believe that the First Circuit's statutory construction in this case is correct, that the

Sixth Amendment holding in *Harris* v. *United States*, 536 U.S. 545 (2002) (plurality opinion), is wrong, and that Congress cannot make the "machinegun" fact a sentencing factor without facially violating the Due Process Clause, the time has also come for the Court to clarify formally the following crucial aspects of substantive reasonableness review, which arise in this case and limit the scope of any remand:

First, a defendant's sentence is substantively unreasonable if a reasonable jurist would find it "greater than necessary" to further Congress's statutorily articulated goals of criminal punishment. *See supra* at 6. Second, the existence of substantive reasonableness review triggers *Apprendi*, and a sentence that would be held substantively *un*reasonable based on the facts found by the jury or admitted by the defendant cannot pass Sixth Amendment muster simply because there is a judicially found fact that changes the calculus. Given this, in determining whether a defendant's sentence violates *Apprendi*, the proper starting point to an appellate court's predicate substantive reasonableness analysis must be the advisory Guidelines' range that reflects the jury-found and admitted facts alone. *Cf., e.g., United States* v. *Sexton*, 512 F.3d 326, 334-35 (6th Cir. 2008) (Merritt, J., dissenting) (noting that, in resolving a defendant's challenge to the substantive reasonableness of his sentence, starting from a Guidelines' range "ratchet[ed] up" by "judicial findings of fact" is "completely inconsistent with the *Blakely* and *Booker* opinions").

E. The Disputed "Machinegun" Fact That Triggers Section 924(c)(1)(B)(ii)'s Statutory Minimum Must Be Treated as an Element in Respondents' Case.

In this case, based on the *Apprendi*-compliant facts (*i.e.*, the plea-admitted facts, and absent a judicial finding of the disputed "machinegun" fact), the advisory Guidelines' sentence for Respondents O'Brien and Burgess is 7 years. U.S.S.G. § 2K2.4(a). While no Guidelines' sentence is binding, in light of the Commission's assessment that 7 years is the appropriate sentence on the facts to which Respondents pled, it is inconceivable that any fair-minded jurist would find that a 30-year sentence could be called for absent a finding that the firearm was a "machinegun." Under *Apprendi*, the legality of a 30-year sentence for Respondents cannot turn, either directly or indirectly, on whether a judge finds the disputed "machinegun" fact. Instead, whether a 30-year sentence is legal must turn on whether that sentence could be imposed absent the disputed "machinegun" fact.

Respondent O'Brien's brief demonstrates in ample detail why, in this case, an appellate court could not affirm as substantively reasonable a 30-year sentence based solely on the *Apprendi*-compliant facts. *See* O'Brien Resp. Br. at 45-50. The same is true as to Burgess, even given his prior record.[6] Because a 30-year sentence imposed on

---

[6] Even upon Burgess's guilty plea to being an "armed career criminal," 18 U.S.C. § 924(e), the sentencing judge imposed no more than the statutory minimum 15-year term for that offense, plus 84 months

(continued)

either Respondent would not be upheld as substantively reasonable on the plea-admitted facts alone, the disputed "machinegun" fact that triggers Section 924(c)(1)(B)(ii)'s statutory minimum must be treated as an element and proven to a jury beyond a reasonable doubt. The Government concedes that it lacks the proof in this case to meet that heavy burden.

Accordingly, *Amici* FAMM and NACDL submit that the judgment of the First Circuit should be affirmed.

(. . . continued)

for his vicarious possession of the firearm, totaling 264 months' imprisonment (22 years). A sentence more than 100% longer than that (*i.e.*, 15 + 30 years) would be outside the range of reasonable difference in applying Section 3553(a). On the Section 924(c) count alone—the count at issue here—the discrepancy would exceed 400% (360 months versus 84 months), far outside any reasonable range of differing judgment.

CONCLUSION

This Court need not address how reasonableness review implicates a Sixth Amendment limitation on federal sentences if it simply affirms the First Circuit on statutory grounds. However, if it disagrees with the First Circuit's construction of Section 924(c)(1)(B)(ii) and also rejects Respondents' facial constitutional challenges to Section 924(c)(1)(B)(ii), it should make clear that the statute's 30-year mandatory minimum nevertheless cannot constitutionally be imposed on Respondents O'Brien and Burgess.

Respectfully submitted,

/s/ Samuel J. Buffone
SAMUEL J. BUFFONE*
*Counsel of Record
AARON M. KATZ
Ropes & Gray LLP
One Metro Center
700 12th Street, NW
Suite 900
Washington, D.C. 20005
(202) 508-4600

MARY PRICE
Vice President &
General Counsel
Families Against
Mandatory Minimums
1612 K Street, N.W.
Suite 700
Washington, D.C. 20006
(202) 822-6700

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

Counsel for *Amici*
Families Against Mandatory Minimums & The
National Association of Criminal Defense Lawyers

January 21, 2010

AMICUS CURIAE BRIEF

B6886
JAN 2010
OFFICE OF THE CLERK

No. 08-1569

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN O'BRIEN and ARTHUR BURGESS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PAUL M. RASHKIND
FRANCES H. PRATT
BRETT G. SWEITZER, Co-Chairs
Amicus Committee
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
601 Walnut St., Ste. 540W
Philadelphia, PA 19106
(215) 928-1100

MARK OSLER
Counsel of Record
BAYLOR LAW SCHOOL
1114 S. University Park Dr.
Waco, TX 76798
(254) 710-4917

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of *Amicus Curiae* 1

Summary of Argument 1

Argument 4

I. The assertion that sentencing factors cannot be subject to Sixth Amendment jury rights, a central proposition of *McMillan*, does not survive *Blakely* and *Booker*, and thus the Sixth Amendment can be applied to what *McMillan* described as sentencing factors 4

A. *McMillan*'s dichotomy between elements and sentencing factors cannot be reconciled with the application of the Sixth Amendment to a sentencing guideline system in *Blakely* 5

1. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) 5

2. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) 8

3. *Harris v. United States*, 536 U.S. 545 (2002) 9

4. *Blakely v. Washington*, 542 U.S. 296 (2004) 10

TABLE OF CONTENTS – Continued

Page

B. The merits opinion in *Booker*, on its face, shows that Sixth Amendment standards may be applied to what *McMillan* and the *Harris* plurality called sentencing factors 12

II. 18 U.S.C. § 924(c)(1)(B)(ii)'s requirement of a mandatory-minimum sentence based on judge-found facts violates the Sixth Amendment 14

A. A majority of the Court has already concluded that the Sixth Amendment's application to the determination of facts establishing statutory maximums and mandatory minimums is indistinguishable 15

B. Requiring jury findings to determine facts establishing mandatory minimums would not unduly burden the administration of criminal law 17

Conclusion 19

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) ....*passim*

Blakely v. Washington, 542 U.S. 296 (2004) .....*passim*

Harris v. United States, 536 U.S. 545 (2002) ....*passim*

Kimbrough v. United States, 552 U.S. 85 (2007).....7

McMillan v. Pennsylvania, 477 U.S. 79 (1986)....*passim*

Postell v. State, 693 S.W.2d 462 (Tex. Ct. Crim. App. 1985) 18

Spears v. United States, 129 S. Ct. 840 (2009).....7

United States v. Booker, 543 U.S. 220 (2005)....*passim*

STATUTES AND GUIDELINES

18 U.S.C. § 924(c) 13

18 U.S.C. § 924(c)(1)(B)(ii) 1, 2

21 U.S.C. § 841(a).....7

Tex. Code of Crim. Pro. § 37.07 18

U.S.S.G. § 2B3.1(b)(2)(C).....13

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD's members represent many defendants who are subject to mandatory-minimum sentences such as those imposed in this case, and who will be directly affected by the Court's decision in this case.

SUMMARY OF ARGUMENT

Much of the briefing in this case addresses, quite appropriately, the question of whether 18 U.S.C. § 924(c)(1)(B)(ii) describes an "element of the offense" or a "sentencing factor." *Amicus* agrees with Respondents that this provision is an element of the offense, and that the case may be decided on that basis.

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

However, even if § 924(c)(1)(B)(ii) is viewed as fitting the historical definition of a "sentencing factor" rather than an element of the offense, the operation of that enhancement in this case still violates the Sixth Amendment.

The first step toward this conclusion is recognizing that traditional sentencing factors based on judge-found facts *can be* in violation of the Sixth Amendment, despite the rule articulated in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which seems to effectively bar the application of the Sixth Amendment to the determination of sentencing factors. That rule, quite simply, cannot survive the decisions of this Court in *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005), both of which applied the Sixth Amendment to sentencing guideline systems that consisted entirely of what a *McMillan*-style analysis would view as sentencing factors. After *Blakely* and *Booker*, there can be no doubt that what *McMillan* viewed as sentencing factors can be found unconstitutional in the absence of jury rights.

Subsequent to *McMillan*, in *Harris v. United States*, 536 U.S. 545 (2002), a plurality of this Court effectively redefined "elements of the offense" to include those facts that set "the outer limits of a sentence," and would limit the operation of the Sixth Amendment to such "elements." 536 U.S. at 567. This redefinition did not garner a majority of the Court, however, and at any rate the rule that results from this redefinition is still punctured by *Blakely* and

Booker, both of which involved sentencing enhancements that did not fit even the expanded definition of "element" provided by the *Harris* plurality.

Once it is recognized that the Sixth Amendment may be implicated in the process of applying what *McMillan* views as sentencing factors, the question remains as to whether imposing the mandatory-minimum sentence applied in this case violates that Amendment. That question has already been answered once by the Court, though not in a unified manner. In *Harris*, five Justices (the four dissenting Justices, and Justice Breyer in his concurrence) set out their view that the mandatory-minimum provision at issue in that case cannot logically be distinguished from the statute at issue in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in terms of the operation of the Sixth Amendment. As Justice Thomas described in the *Harris* dissent, the harm to a defendant is the same whether an enhancement raises a maximum sentence or establishes a mandatory minimum, and that potential harm is one that should be accompanied by the protections of the Sixth Amendment. 536 U.S. at 580.

Finally, the granting of jury rights to those facing mandatory-minimum sentences would not be unduly burdensome to the administration of criminal justice. Unlike sentencing guidelines, which involve enhancements based on a multitude of factors, mandatory minimums (including the one at issue here) usually rest on the establishment of a single fact, which can easily be included in the indictment and either tried

to a verdict beyond a reasonable doubt or admitted by the defendant in the course of pleading guilty.

ARGUMENT

I. The assertion that sentencing factors cannot be subject to Sixth Amendment jury rights, a central proposition of *McMillan*, does not survive *Blakely* and *Booker*, and thus the Sixth Amendment can be applied to what *McMillan* described as sentencing factors.

The government contends that two decisions of this Court establish that statutory mandatory-minimum sentences do not violate the Sixth Amendment. Those cases, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (majority opinion) and *Harris v. United States*, 536 U.S. 545 (2002) (plurality opinion), seemingly set out a simple logic: mandatory-minimum provisions such as the one at issue here are sentencing factors (not elements), and because the Sixth Amendment does not require juries at sentencing, there can be no violation of the Sixth Amendment if these sentencing factors are determined by a judge rather than a jury.

Thus, *McMillan* (and the *Harris* plurality) turned on a relatively bright-line rule – elements of the offense are subject to the Sixth Amendment, while sentencing factors are not – leaving as the crucial question whether or not a particular factual

determination involved an element or a sentencing factor. Subsequent cases, however, have obliterated that line by applying the Sixth Amendment to what would be considered sentencing factors under *McMillan* (and the *Harris* plurality). In *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005), the Court struck down two sentencing guideline systems. Because these guideline systems consisted entirely of what would have been considered sentencing factors under either *McMillan* or the *Harris* plurality, the Court has already made it very clear that the Sixth Amendment can be applied to sentencing factors.

A. *McMillan*'s dichotomy between elements and sentencing factors cannot be reconciled with the application of the Sixth Amendment to a sentencing guideline system in *Blakely*.

1. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)

McMillan involved a Sixth Amendment challenge to Pennsylvania's Mandatory Minimum Sentencing Act, which mandated five-year sentences where a defendant "visibly possessed a firearm" in the course of certain felonies. 477 U.S. at 81. The Court upheld Pennsylvania's sentencing scheme, finding that the enhancements provided therein were "sentencing factors" rather than "elements" of the offense, and thus did not have to be proven beyond a reasonable

doubt to the jury, as there is no right to a jury at sentencing. 477 U.S. at 93.

On the way to that outcome, the *McMillan* Court defined "elements" as those specific factors that are "included in the definition of the offense." 477 U.S. at 85. In turn, sentencing factors were everything else – that is, factual issues that are not necessary to conviction, but determine the severity of punishment. *Id.* at 86. Traditionally, elements were described in the penal code, while sentencing factors were not; rather, sentencing factors were the facts a judge might choose to focus on in choosing a sentence somewhere within the range of sentences available for the offense. If a jury convicted a defendant of robbery, for example, that meant that a jury had found each element of the offense. Subsequently, a judge could consider additional facts in order to pick a sentence that was allowed by statute – for example, she could give the statutory maximum because the defendant had nearly killed the victim.

The timing of *McMillan* is significant, because it makes this simple distinction between elements and sentencing factors more understandable, and yet less relevant to the present time. 1986 was the year before the federal sentencing guidelines came into effect, and the same year that Len Bias died at the University of Maryland and (in part as a result of Bias' death) the most onerous of the mandatory-minimum

provisions of 21 U.S.C. § 841(a) came into effect.[2] The development of the sentencing guidelines and the imposition of new mandatory-minimum sentences in narcotics cases played major roles in ushering federal sentencing into a new and more complex era, and one in which the dichotomy between elements and sentencing factors makes far less sense. In that simpler era, when juries convicted and judges then sentenced with broad discretion,[3] it is understandable how the *McMillan* Court could dispatch these issues in a few sentences.[4] The logic was swift and clean: "Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury

---

[2] Len Bias was the University of Maryland basketball player whose death helped create political support for the harsh, mandatory crack cocaine sentences contained in the revised 21 U.S.C. § 841(a). Subsequently, crack cocaine cases under these provisions and the corresponding sentencing guidelines frequently were the vehicles by which this Court examined difficult sentencing issues. *See United States v. Booker*, 543 U.S. 220 (2005); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009).

[3] This evolution was well described in the plurality opinion in *Harris v. United States*, 536 U.S. 545, 558-59 (2002).

[4] The relevant discussion in *McMillan* is contained in a single paragraph, which begins by stating that the proffered conflict between mandatory sentencing and the Sixth Amendment merits "little discussion," which in itself distinguishes the legal landscape of 1986 from the post-*Blakely* world. 477 U.S. at 93.

sentencing, even where the sentence turns on specific findings of fact." 477 U.S. at 93.

2. *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

Apprendi, in turn, considered a New Jersey statute that allowed for a sentence of between five and ten years for possession of a gun for an unlawful purpose. A second statute increased the statutory sentencing range to ten to twenty years if a judge found at sentencing that that purpose was to intimidate a member of a protected group. 530 U.S. at 468-69.

In defending its hate-crime statute, New Jersey in part pointed to *McMillan* and asserted that the aggravating factor (racial animus) was in fact nothing more than one way to phrase the traditional sentencing factor of motive, and that *McMillan* approved the finding of such sentencing factors by a judge rather than a jury. 530 U.S. at 492. The Court rejected this logic primarily on the first point, not the second. Specifically, the majority opinion clarified that what matters is not the technical distinction between an element and a sentencing factor ("labels do not afford an acceptable answer"), but the effect of the finding. 530 U.S. at 494. It would seem, then, that *Apprendi* represents a step away from the dichotomy between elements and sentencing factors that had been so clearly articulated in *McMillan* fourteen years earlier. Those fourteen years, not coincidentally, represented the period in which sentencing guidelines systems

came into effect at the federal level and in many states, and in which mandatory minimums became a more significant part of federal sentencing.

3. *Harris v. United States*, 536 U.S. 545 (2002)

Harris followed *Apprendi* by two years. The petitioner in *Harris* challenged the "brandishing" provision of 18 U.S.C. § 924(c), which increased the mandatory minimum to seven years (from five) if a judge found at sentencing that the defendant brandished a gun as opposed to simply having carried it.

A plurality of the Court upheld the statute. The split vote, however, resulted in a very limited holding. Five Members of the Court (Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Breyer) voted to uphold the statute, but only four concluded that *Apprendi* applies only to factual determinations that set statutory maximums and not to those that establish mandatory minimums. Justice Breyer concurred in the judgment, but wrote separately to state that he could not easily distinguish *Apprendi* "from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion so far as it finds such a distinction." 536 U.S. at 569. Justice Breyer's concurrence was based, instead, on his conviction that *Apprendi* was wrongly decided and that *both* statutory maximums and mandatory minimums are properly set by judge-found sentencing factors. *Id.*

Justice Kennedy's plurality opinion accepted the *McMillan* dichotomy between elements and sentencing factors, even as it redefined "elements of an offense" beyond simply what a jury must find in order to convict. That redefinition is odd, strained, and seems to be far from the traditional understanding of "elements" that *McMillan* described: "Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." 536 U.S. at 567. Importantly, though, this redefinition is in Part III of Justice Kennedy's opinion, which did not gain Justice Breyer's support, and thus did not constitute a majority position. 536 U.S. at 572 (Breyer, J., concurring).

Because *McMillan*'s bright-line rule (based on what a statute directs a jury to find) constituted a majority position while *Harris*'s redefinition (expanded to include facts that set the outer limit of a sentence) did not, it is only the *McMillan* rule that has the force of precedent.

4. *Blakely v. Washington*, 542 U.S. 296 (2004)

Blakely addressed a challenge to the Washington Sentencing Reform Act, which established mandatory sentencing guidelines directing sentences beneath statutory maximums but within ranges that could be determined by judge-found facts. Ralph Blakely, for

example, pleaded guilty to a kidnapping charge with a statutory-maximum penalty of ten years. 542 U.S. at 299. Under Washington's sentencing guidelines, though, he faced a sentence (without enhancements) of forty-nine to fifty-three months. *Id.* However, Blakely could face a sentence above that range (but still below the statutory maximum) if the judge found a fact that justified such a departure. *Id.* The judge did find such a fact (that Blakely acted with deliberate cruelty), and sentenced him to ninety months, which was more than the presumptive guideline range but less than the statutory maximum. *Id.*

It was this sentencing scheme that the Court struck down in *Blakely*. In so doing, the Court rejected both the bright-line rule of *McMillan and* the view of the four-Justice *Harris* plurality that *Apprendi* applies only to enhancements (redefined there as "elements of the offense") that exceed otherwise-applicable statutory maximums. Blakely's enhancement, after all, was not an element of the offense of conviction and did not push his sentence above the statutory maximum.

What is most significant about *Blakely*, and the reason that the *McMillan* dichotomy between elements and sentencing factors falls in its wake, is that *Blakely* plainly ruled contrary to the central proposition of *McMillan* – that anything beyond an element of the offense is not subject to the Sixth Amendment. *Blakely* struck down a statute for its failure to require jury findings for what indisputably are sentencing factors under *McMillan*.

Though (as described above) the *Harris* redefinition of "elements" lacks the precedential force of *McMillan*, it, too, falls under the bare essence of what *Blakely* did. The *Harris* plurality would have the definition of "elements" include those facts that allow an otherwise-applicable statutory maximum to be exceeded, but *Blakely* stood firmly for the proposition that the Sixth Amendment is implicated even when statutory maximums are not affected.

After *Blakely*, it is clear that the Sixth Amendment can and will be applied to fact determinations that would have been categorized as "sentencing factors" under the *McMillan* bright-line definition, or even under the modified definition provided by the *Harris* plurality.

B. The merits opinion in *Booker*, on its face, shows that Sixth Amendment standards may be applied to what *McMillan* and the *Harris* plurality called sentencing factors.

Booker, of course, extended the rule of *Blakely* to the federal sentencing guidelines. It did so through two majority opinions: a merits opinion, holding that the then-current mandatory guidelines are unconstitutional in that they denied defendants their right to jury determinations of enhancement factors, and a remedial opinion, which effectively cured the problem by making the federal guidelines advisory rather than mandatory. At a basic level, *Booker* reiterated

the holding of *Blakely*, which had made it clear that the Sixth Amendment could apply to what would be "sentencing factors" under the definitions provided in both *McMillan* and the *Harris* plurality. Quite simply, *Booker* again struck down, under the Sixth Amendment, an entire system resting on factual determinations that would be categorized as "sentencing factors" under either *McMillan* or the *Harris* plurality, as these factors neither were part of the penal code definition of a crime, nor did they allow for statutory maximums to be exceeded.

Booker, though, constituted a more specific rejection of *McMillan* and the *Harris* plurality in the context of this case, because the guidelines rejected included the same factual determinations as at issue in *Harris*. *Harris* involved the enhancement under 18 U.S.C. § 924(c) for "brandishing" a weapon, and the guidelines found defective under *Booker* contain an enhancement for the same factor, under U.S.S.G. § 2B3.1(b)(2)(C) (providing increase of five offense levels if a firearm is "brandished" during a robbery). This factor, under the guidelines, affected the sentence but did not budge the statutory maximum, and thus did not meet the definition of "element" under the standard articulated by the *Harris* plurality. Quite directly, then, after *Booker*, it is clear that what were considered sentencing factors even under the expanded definition provided in the *Harris* plurality are now subject to Sixth Amendment analysis.

The bar to considering the Sixth Amendment implications of determinations that had been defined as sentencing factors is now gone. The only issue is whether or not the determination of fact at issue in this case does, in fact, violate the Sixth Amendment.

II. 18 U.S.C. § 924(c)(1)(B)(ii)'s requirement of a mandatory-minimum sentence based on judge-found facts violates the Sixth Amendment.

The question remains, then, whether the mandatory-minimum provision at issue in this case violates the Sixth Amendment. A majority of the Court has already opined (in *Harris*) that the Sixth Amendment's application to the statute in *Harris* (and in the similar mandatory-minimum provision at issue here) is indistinguishable from its operation in *Apprendi*. By that sound logic, the rule in *Apprendi* should be applied to the mandatory-minimum sentencing provision here, and jury rights required if that provision is to be constitutionally employed.

A. A majority of the Court has already concluded that the Sixth Amendment's application to the determination of facts establishing statutory maximums and mandatory minimums is indistinguishable.

Although five Members of the Court voted to uphold the statute at issue in *Harris*, only four (Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia) did so by distinguishing *Apprendi*. Justice Breyer, while concurring in the judgment, made it clear that he did so because he still rejected the *Apprendi* decision, and thought that judge-found facts should be permitted to both establish mandatory-minimum sentences and be used to exceed otherwise-applicable statutory maximum sentences. 536 U.S. at 569 (Breyer, J., concurring).

In so doing, Justice Breyer joined with the dissenters (Justices Thomas, Ginsburg, Stevens, and Souter) in concluding that *Apprendi* and *Harris* cannot be logically distinguished – in fact, Justice Breyer was quite clear in this, stating that he could not "agree with the plurality's opinion insofar as it finds such a distinction," *id.*, and declining to join the plurality in Part III of Justice Kennedy's opinion, which attempted to distinguish *Apprendi* from *Harris*. 536 U.S. at 572. Thus the dissenting view – that if *Apprendi* is good law, then the Sixth Amendment would bar mandatory minimums established by judge-found facts – had the support of five Justices.

In that dissenting opinion, Justice Thomas explained why the *Apprendi* logic also applies to mandatory minimums. Constitutional rights protect individuals, and the effect on an individual defendant is the same regardless of whether he is subject to a judge-found mandatory minimum or a sentence that may exceed an otherwise-applicable maximum sentence:

> Looking at the principles that animated the decision in *Apprendi* and the bases for the historical practice upon which *Apprendi* rested (rather than to the historical pedigree of mandatory minimums), there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum. In either case the defendant cannot predict the judgment from the face of the felony, see 530 U.S. at 478-479, and the absolute statutory limits of his punishment change, constituting an increased penalty. In either case the defendant must be afforded the procedural protections of notice, a jury trial, and a heightened standard of proof with respect to the facts warranting exposure to a greater penalty.

536 U.S. at 579-80.

The intervening years have not weakened this logic. In *Booker*, this rationale for upholding and extending the jury right was reaffirmed, albeit without reference to mandatory minimums. Specifically, and importantly, the *Booker* merits opinion recognizes

that the jury right was demanded by the Framers of the Constitution at least in part out of a fear of "'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases." 543 U.S. at 238-39 (*quoting* The Federalist No. 83, p. 499 (C. Rossiter ed. 1961) (A. Hamilton)). The specter of judicial despotism is raised again when a judge, as here, can increase a sentence from five to 30 years by determining a fact, on her own, by a preponderance of the evidence. As five Members of the Court concluded in *Harris*, if *Apprendi* is taken as good law (as it has been in several cases since 2000), it must apply to mandatory minimums as well.

B. Requiring jury findings to determine facts establishing mandatory minimums would not unduly burden the administration of criminal law.

Unlike the Court's remedial choice in *Booker*, it is not possible to simply make mandatory minimums advisory, as their mandatory nature is their very essence. Thus, the probable remedy would be to require jury findings of any facts necessary to establish a mandatory minimum.

In *Booker*, the remedial opinion expressed great concern about the burdens that jury rights attached to guideline enhancements might impose on the

federal system of criminal justice.[5] 543 U.S. at 252-57. Those concerns are lessened when mandatory minimums are at issue, because there will usually be only a single fact to be considered, rather than the multitude of enhancement facts that are presented in almost any guidelines case. For example, in this case it would have been fairly simple for the government to have charged the circumstances that led to the enhancement applied against Respondents, and for the jury to have made findings on the matter.

Many States already provide an example of how an efficient system can accommodate jury findings for enhancements. Texas, for example, is hardly considered a defendant's paradise. However, Texas not only provides for a right to jury sentencing in all felony cases,[6] but directs that aggravating factors must be proven beyond a reasonable doubt. Apparently, it is possible to run a highly efficient criminal adjudication system while incorporating substantial jury rights relating to traditional sentencing factors. The comparatively small cost of providing such rights in the limited arena of mandatory minimums is far outweighed by the value to defendants and justice of

---

[5] The merits opinion, in contrast, emphasized that " . . . the interest in fairness and reliability protected by the right to a jury trial – a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment – has always outweighed the interest in concluding trials swiftly." 543 U.S. at 244.

[6] Tex. Code Crim. Pro. § 37.07; *Postell v. State*, 693 S.W.2d 462 (Tex. Ct. Crim. App. 1985) (*en banc*).

the long-overdue application of *Apprendi* to fact-based mandatory-minimum sentence determinations.

CONCLUSION

For the foregoing reasons, and for those set forth in the Respondents' briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

PAUL M. RASHKIND
FRANCES H. PRATT
BRETT G. SWEITZER, Co-Chairs
Amicus Committee
NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS
601 Walnut St., Ste. 540W
Philadelphia, PA 19106
(215) 928-1100

MARK OSLER
Counsel of Record
BAYLOR LAW SCHOOL
1114 S. University Park Dr.
Waco, TX 76798
(254) 710-4917

Counsel for Amicus Curiae
National Association of Federal Defenders

January 21, 2010